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82-1304
No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MONTGOMERY WARD & CO., INCORPORATED,
an Illinois Corporation,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, AND WAREHOUSE, MAIL ORDER, OFFICE, TECHNICAL AND PROFESSIONAL EMPLOYEES LOCAL 743, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether nonemployee union organizer access to an employer's private property is to be determined by a balancing of organizational and private property rights.

2. Whether the fact that private property is open to the public is a relevant factor in determining whether nonemployee union organizers can solicit on that private property.

3. Whether an employer's no solicitation rule prohibiting nonemployee solicitation at all times on its premises is violative of the National Labor Relations Act when it is applied to prohibit nonemployee union organizers from meeting with off-duty employees at meetings in the employer's department store restaurant.

4. Whether the Court of Appeals erred in considering the question of the nonemployee union organizers' alternative access without remanding the case to the National Labor Relations Board for a determination on this issue.

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The petitioner, Montgomery Ward & Co., Incorporated[1], respectfully prays that a Writ of Certiorari issue to review the

[1] Pursuant to Supreme Court Rule 28.1, Petitioner submits the following statement: Montgomery Ward & Co., Incorporated is a wholly owned subsidiary of Marcor, Inc., a wholly owned subsidiary of Mobil Corporation. The following entities are non-wholly owned subsidiaries of Montgomery Ward & Co., Incorporated: Marinco Insurance International Inc., Montgomery Ward Life Insurance Company, Montgomery Ward Commercial Ltda. and MW-Export, S.A. de C.V. The following entities are affiliates of Montgomery Ward & Co., Incorporated: Container Corporation of America.

judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on November 10, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals, reported at 692 F. 2d 1115 (7th Cir. 1982) appears in the Appendix hereto. The decision and order of the National Labor Relations Board, reported at 256 NLRB 134 (1981) and the decision of the Administrative Law Judge, Case No. 13-CA-17109, are also reproduced in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on November 10, 1982. Rehearing was not sought. This petition for certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29 § 157.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) of this title.

United States Code, Title 29 § 158(a).

It shall be an unfair employment practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

STATEMENT OF THE CASE

A. Nature of the Case:

On December 7, 1977, the Warehouse, Mail Order, Office, Technical and Professional Employees, Local 743 (the "Union") filed an unfair labor practice charge against Montgomery Ward & Co., Incorporated ("Ward") arising out of the Union's organizational activities at Ward's Lombard, Illinois, facility. The essence of the charge was that Ward had discriminatorily placed an employee on probation. Shortly thereafter, on December 22, 1977, the Union filed a first amended unfair labor practice charge incorporating allegations that Ward's actions to limit the solicitation activities of nonemployee union organizers on its premises violated the National Labor Relations Act ("the Act").

A complaint was issued by the National Labor Relations Board (the "Board") on the basis of the Union's first amended unfair labor practice charge. On the day of hearing, a Settlement Agreement disposed of all but the allegation concerning the solicitation activities of the nonemployee union organizers in the Ward Buffeteria and Ward's efforts to end the solicitation. A hearing was held and briefs were submitted to the Administrative Law Judge (the "ALJ").

The ALJ found that Ward had discriminatorily enforced its no solicitation rule and engaged in surveillance of the union organizers while soliciting, and, further, had violated the Act by threatening to call the police and have the organizers removed if they refused to voluntarily leave the premises. The ALJ

expressly declined to rule upon one of the issues raised by the General Counsel and Union, namely that Ward could not lawfully enforce even a nondiscriminatory no solicitation rule that would forbid nonemployee union organizers to meet with off duty employees in Ward's Buffeteria to discuss the union, so long as they conducted themselves consistent with the purpose of the Buffeteria.

Both Ward and the General Counsel filed exceptions with supporting briefs to select portions of the ALJ's decision and recommended order. The Board affirmed the ALJ's decision as to discriminatory maintenance and enforcement of the no solicitation rule without comment. The Board also affirmed the ALJ's findings as to unlawful surveillance and threats of arrest. However, the Board reversed the ALJ and determined that it was appropriate to rule on the contentions raised by the General Counsel and the Union that even a nondiscriminatory no solicitation rule may be unlawful if applied in a manner to prohibit nonemployee union organizers from meeting with off duty employees in a department store restaurant, so long as they conduct themselves in a manner consistent with the purpose of the restaurant. The Board determined such non-employee organizer activity to be appropriate. Ward filed timely motions to reconsider and stay the Board decision, both of which were opposed by the Union. The Board denied both Ward motions.

Ward then filed a Petition for Review before the United States Court of Appeals for the Seventh Circuit pursuant to 29 U. S. C. § 160(f). The Board filed a cross-application for enforcement of the Board order. The Union was granted leave to intervene and the American Retail Federation was granted leave to appear as amicus curiae in support of Ward. The matter was fully briefed and oral argument was heard.

In an opinion handed down on November 10, 1982, the Court of Appeals granted enforcement of the Board order.

B. Statement of Facts:

Ward owns a two level retail store on a parcel of land in the Yorktown Shopping Center in Lombard, Illinois, a large, enclosed shopping mall. The lower level of the retail store houses three credit operations: two credit service centers and a credit operating center. It was the employees of the credit center that the Union was interested in organizing.

There is a Buffeteria located on the upper level of the retail store. It is a cafeteria type restaurant that sells food and beverages to the public including employees of the retail store and credit operations. These employees account for approximately twenty percent of the Buffeteria's sales. The Buffeteria seats a maximum of 170 people at very small tables, each of which seats two people. These tables are arranged in clusters of two, three and four tables, with aisles between the clusters of three to three and one-half feet in width. The Buffeteria is a selling department of the retail store. Its objective is to generate maximum sales and profits. Turnover of customers is essential in light of the limited seating.

A no solicitation rule was in effect and enforced in all departments of the Lombard store, including the Buffeteria and all Ward property.[2] The portion of Ward's no solicitation rule in question is as follows:

Solicitation by non-employees of the Company is prohibited at all times in the store and store operated buildings.

On December 2, 1977, two nonemployee union organizers entered the Ward store and proceeded to the Buffeteria. Their purpose for being at Ward was to solicit credit center employees for union membership. The organizers had made arrangements several days earlier to meet in the Buffeteria with three

[2] The no solicitation rule is set forth in its entirety at App. 74a.

employees at noon and six other employees at twelve thirty. These same organizers had passed out union literature earlier in the day on the sidewalk adjacent to the Ward store.

At the time the organizers entered the Buffeteria, two Ward supervisory personnel were in the Buffeteria line ordering lunch. One of the supervisors, having observed these individuals distributing literature on the sidewalk, recognized the organizers. Both supervisors left the food line and approached the table at which the organizers were seated and asked to speak with them outside the Buffeteria.

Once in an aisle of the store outside the Buffeteria, Ward's supervisors asked the nonemployee organizers their purpose for being on Ward property. The organizers stated that they were there for the purpose of soliciting Ward employees for union membership. The organizers were then informed that this solicitation violated Ward's no solicitation rule and demand was made upon them to stop soliciting and leave immediately. The organizers refused to stop soliciting or leave. The supervisors then informed the organizers that, if they did not voluntarily cease their solicitation and leave the store, the Lombard police would be called. The organizers again refused to stop their solicitation or leave, and returned to the Buffeteria, purchased some lunch, and sat at a table adjacent to some Ward employees. The two supervisors returned to the Buffeteria and called the Lombard police.

Upon the arrival of two Lombard police officers, the Ward supervisors explained the situation and accompanied the police to the table at which the organizers were seated.

After some discussion, the organizers gave their assurances to the police and the Ward supervisors that they would eat their lunch and leave the store. The supervisors remained in the Buffeteria to ensure that no further solicitation of Ward employees occurred. After finishing their lunch, the organizers left.

REASONS FOR GRANTING THE WRIT

1. The decision below misconstrues the decision of this Court as to when, under the National Labor Relations Act, nonemployee union organizers will be allowed onto an employer's privately owned property for the purpose of soliciting for union membership.

In *NLRB* v. *Babcock & Wilcox Co.*, 351 U. S. 105, 76 S. Ct. 679, 100 L. Ed. 953 (1956), a benchmark decision by this Court in the area of the rights of nonemployee union organizers on private property, this Court stated:

> It is our judgment, however, that an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution.
>
> This is not a problem of always open or always closed doors for union organization on company property. Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other. The employer may not affirmatively interfere with organization; the union may not always insist that the employer aid organization. But when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication of information on the right to organize. (p. 112).

In *Babcock & Wilcox* the employer, a manufacturer of tubular products, maintained a policy against pamphleteering on company property. In accord with that policy, nonemployee union organizers were refused permission to distribute union

literature on company-owned parking lots. The employer was charged with a violation of Section 8(a)(1) of the Act. This Court held that the Act did not require that the employer permit the use of its facilities for organization when other means were readily available.

The Court of Appeals for the Seventh Circuit correctly noted that the rule of *Babcock & Wilcox* has been applied in solicitation cases such as this case, as well as in distribution of union literature situations. (App. 7a, Fn. 5). However, the Court of Appeals incorrectly proceeded to interpret *Babcock & Wilcox* to mandate "... that the competing interests found in the particular context must be balanced." (App. 15a). The authority for the Court's position is extracted by the Court from a fragment of the explanatory language of this Court's opinion in *Babcock & Wilcox*, at page 112:

> This is not a problem of always open or always closed doors for union organization on company property. Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little destruction of one as is consistent with the maintenance of the other.

The Seventh Circuit construes this language as authorizing the process of accommodating or balancing of private property interests and organizational interests where nonemployee access is the issue. (App. 16a). It is the Court's position that discriminatory enforcement of a no solicitation rule or lack of alternative access are not prerequisites to the balancing or accommodation process. In the Court's opinion, discriminatory enforcement of the no solicitation rule and alternative access are merely significant factors to weigh in the balancing or accommodation process. (App. 16a). In fact, the Court goes so far as to label the requirement of difficulty of alternative access by the union nothing but a restrictive interpretation of *Babcock & Wilcox* and in the nature of a "restrictive gloss." (App. 22a).

The Court's rationale for its interpretation of *Babcock & Wilcox* is based on first, its bare statement that to hold otherwise is an oversimplified and mechanistic application of *Babcock & Wilcox*. (App. 16a). Second, the Court narrowly focuses upon the accommodation of organizational and property rights language found at page 112 of this Court's opinion. Third, the Court relies upon an incorrect interpretation of two of this Court's subsequent decisions to bolster its interpretation of *Babcock & Wilcox*. Lastly, the Court entertains the mistaken belief that the rule requiring discriminatory enforcement of a no solicitation rule or lack of alternative access as a prerequisite to nonemployee union organizer access to private property for solicitation purposes, is limited to the facts of *Babcock & Wilcox*. The facts the Court focuses on are that *Babcock & Wilcox* involved the parking lot of a factory, located close to small, well-settled communities where a large percentage of the employees live.

An analysis of this Court's decision in *Babcock & Wilcox* reveals that the language addressing the accommodation of property and organizational rights is in the nature of an explanation or clarification for the diminution of the employer's private property rights. This language is a justification for the allowance of the criteria of discriminatory enforcement and lack of alternative access as a basis for the intrusion upon private property rights. This language must be read in conjunction with the language immediately preceding it in this Court's opinion in *Babcock & Wilcox* for a true understanding of this Court's holding. It cannot, and should not, be read standing alone and apart insofar as nonemployee access to private property for solicitation is concerned.

This interpretation is consistent with subsequent decisions of this Court. In *Central Hardware Company* v. *NLRB*, 407 U. S. 539, 92 S. Ct. 2238, 33 L. Ed. 2d 122 (1972), a case involving nonemployee solicitation on a hardware retailer's

parking lot, this Court quoted directly from *Babcock & Wilcox*, at page 112 and affirmed that there must indeed be a demonstrated lack of alternative access before nonemployee union organizers will be allowed access to an employer's private property. *Central Hardware* at 544-545. It is of considerable importance to note that in *Central Hardware* this Court applied the principle of *Babcock & Wilcox* beyond the setting of a parking lot of a factory located close to small well-settled communities where a large percentage of the employees live. The Seventh Circuit's position that *Babcock & Wilcox* is limited to its facts is clearly contrary to this Court's posture.

More recently, in *Sears, Roebuck & Co.* v. *San Diego County Council of Carpenters*, 436 U. S. 180, 98 S. Ct. 1745, 56 L. Ed. 2d 209 (1978), this Court stated:

> While *Babcock* indicates that an employer may not always bar non-employee union organizers from his property, his right to do so remains the general rule. To gain access, the union has the burden of showing that no other reasonable means of communicating its organizational message to the employees exists or that the employer's access rules discriminate against union solicitation. *Sears, Roebuck & Co.* at 205.

In short, the Seventh Circuit's decision radically departs from the well established rule of this Court as enunciated in *Babcock & Wilcox*, and reaffirmed by this Court in *Central Hardware* and *Sears, Roebuck & Co.*

The Court's justification for its approach, other than a distorted reading out of context of this Court's opinion, is that this Court's decision in *Hudgens* v. *NLRB*, 424 U. S. 507, 96 S. Ct. 1029, 47 L. Ed. 2d 196 (1976) as well as in *Beth Israel Hospital* v. *NLRB* 437 U. S. 483, 98 S. Ct. 2463, 57 L. Ed 2d 370 (1978), are consistent with its interpretation of *Babcock & Wilcox*. However, *Hudgens* was a case decided some two years before this Court's *Sears, Roebuck & Co.* decision. The decision

of this Court in *Sears, Roebuck & Co.* clearly reaffirmed the *Babcock & Wilcox* doctrine. *Beth Israel* was an organizational activity case, but one of employee to employee organizational activity, *not* [Emphasis added] a case involving nonemployee access to private property. As such, its value in being instructive to the case at hand is remote at best as totally different standards apply to employee versus nonemployee solicitation.

For these reasons, the decision below has misconstrued this Court's decision in *Babcock & Wilcox.*

2. The decision below fails to recognize the decision of this Court that private property open to the public does not lose the protection afforded private property.

In construing *Babcock & Wilcox* in the manner in which it has, the Court of Appeals has insidiously breathed life into the long discarded theory that private property open to the public is somehow different from private property to which the public is not invited, and consequently, the property owner loses his ability to restrict access to that property. The Court of Appeals finds that "... public access to the premises ... is significant to the balance of property and organizational interest ..." (App. 17). This statement represents the proposition that private property open to the public acquires a public characteristic. The theory that private property open to the public loses its private charter and assumes quasi-public attributes is a thinly disguised reversion to the now overruled rationale of *Amalgamated Food Employees' Union* v. *Logan Valley Plaza,* 391 U. S. 308, 88 S. Ct. 1601, 20 L. Ed. 2d 603 (1968) and its predecessor, *Marsh* v. *Alabama,* 326 U. S. 501, 66 S. Ct. 276, 90 L. Ed. 265 (1946).

This Court implicitly rejected this proposition in *Lloyd Corporation, Ltd.* v. *Tanner,* 407 U. S. 551, 92 S. Ct. 2219, 33 L. Ed. 2d 131 (1972) stating:

> . . . Nor does property lose its private character merely because the public is generally invited to use it for designated purposes. Few would argue that a free-standing store, with abutting parking space for customers, assumes significant public attributes merely because the public is invited to shop there. Nor is size alone the controlling factor. The essentially private character of a store and its privately owned abutting property does not change by virtue or being large or clustered with other stores in a modern shopping center. (page 569).

Four years later, in the *Hudgens* case, this Court proceeded to expressly reject the doctrine of quasi-public property, clearly stating:

> . . . we make clear now, if it was not clear before, that the rationale of *Logan Valley* did not survive the Court's decision in the *Lloyd* case. (page 518).

Further, the Seventh Circuit's approval of *Marshall Field & Company*, 98 NLRB 88, *mod. and enfd. on other grounds* 200 F. 2d 357 (7th Cir. 1952) is erroneous as that decision pre-dates this Court's decision in *Babcock & Wilcox*, as well as the decision in *Lloyd* and *Hudgens*.

The *Marshall Field* decision, again, stands for the concept that private property open to the public, in that case a department store restaurant, cannot be protected from nonemployee solicitation activity. The analysis in that case, in its simplest terms, was that since the nonemployee union organizers were superficially using the restaurant as other members of the public appeared to be using that same restaurant, their activities on the premises could not be prohibited. Again, this hearkens back to a quasi-public property concept. The decisions of this Court leave no room for the proposition that a restaurant open to the public is available to nonemployee union organizers for organizational activities absent discriminatory enforcement of the employer's no solicitation rule or lack of alternative access by the nonemployee organizers.

If this Court does not review the decision of the Court of Appeals, it will, by its declination, approve the primordial exception to the *Babcock & Wilcox* principle, and will cast all owners of private property into doubt as to whether or not they can lawfully bar nonemployees from soliciting on their premises.

3. The decision below represents a departure from the normal role of the Court of Appeals in that the Court considered and decided a question of fact not previously considered by the ALJ or the Board.

The ALJ, in her decision, expressly did not rule upon the issue of whether alternative means of access were available to the Union, stating:

> In short, the General Counsel and the Union tender an essentially theoretical question when they urge that Respondent could not lawfully enforce even a nondiscriminatory no-solicitation rule to the extent of forbidding union organizers to meet with off-duty employees in the Buffeteria to discuss the Union, so long as they conduct themselves consistently with the purposes of the cafeteria. In view of the academic nature of the parties' dispute about the legality of such a nondiscriminatory ban, I need not and do not determine whether the legality of such a restriction would depend on the *Babcock* standard of whether "reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message" (351 U. S. at 112). Accordingly, neither do I determine whether that standard has been satisfied here. (App. 66a, 67a).

Similarly, the Board never considered the issue of alternative access in its decision, as it found the principle of *Babcock & Wilcox* to be inapplicable to the facts of this case, stating:

> We find merit in the contention of the General Counsel that the *Babcock & Wilcox* rationale typically controls in situtations where union organizers use "private"

> property to which the public is not invited in a manner inconsistent with the property's intended purpose, rather than use of a public restaurant for personal discussion while dining. (App. 32a).

It is, for the first time, on review by the Court, that a consideration of the issue of alternative access arises. This is by the Court's own admission. (App. 19a Fn. 11). At this point the Court properly should have remanded the case back to the Board for its determination on the issue of alternative access. Instead, the Court, after acknowledging that difficulty of access by the Union to the employees is significant to the balance of property and organizational interests, proceeds to evaluate alternative access. (App. 17a).

The Court's analysis is as follows:

> On the one hand, the weight of the employees' interest here is substantially increased by the fact that there are major obstacles to access to them by union organizers. The setting is a large shopping mall surrounded by highways. Presumably it would be difficult to follow the employees to their homes. The employees usually eat on the premises and have only a one-half hour break for lunch; the nearest restaurant facilities are a ten minute walk. The union was not given a list of the names of credit center employees and could not identify their cars in the parking lot. (App. 18a, 19a).

In accord with the Court's duty as a reviewing body and in keeping with its accepted scope of review, consideration of the issue of alternative access was improper and the petitioner has been prejudiced by it.

CONCLUSION

For these reasons, a Writ of Certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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In the

United States Court of Appeals

For the Seventh Circuit

No. 81-2501

MONTGOMERY WARD & COMPANY, INC.,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

WAREHOUSE, MAIL ORDER, OFFICE, TECHNICAL AND PROFESSIONAL EMPLOYEES LOCAL 743, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Intervening-Respondents.

On Administrative Review of an Order of the National Labor Relations Board.

ARGUED JUNE 10, 1982—DECIDED NOVEMBER 10, 1982

Before CUMMINGS, *Chief Circuit Judge*, CUDAHY, *Circuit Judge*, and EAST, *Senior District Judge*.*

CUDAHY, *Circuit Judge*. Whether employers may prohibit nonemployee union organizers from entering their property to discuss unionization with employees is a highly sensitive question. It arises from the inherent ten-

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* The Honorable William G. East, Senior District Judge for the District of Oregon, is sitting by designation.

sion between the self-organization rights of employees and the property rights of employers. In the case before us, the National Labor Relations Board (the "Board") determined that an employer's no-solicitation rule, even when applied in a nondiscriminatory manner to prohibit nonemployee union organizers from meeting with off-duty employees in a cafeteria-style department store restaurant, violated section 8(a)(1) of the National Labor Relations Act (the "Act"), 29 U.S.C. § 158(a)(1) (1976). The employer and petitioner, Montgomery Ward & Co., Inc. ("Montgomery Ward"), supported by the American Retail Federation as *amicus curiae*, seeks our review of the Board's order. The Board, supported by the intervening Local 743, Warehouse, Mail Order, Office, Technical and Professional Employees, Teamsters Union (the "Union"), has filed a cross-application for enforcement of its order. We grant enforcement of the Board's order, but carefully limit our decision to the facts which we set forth below.

I.

The facts are, for the most part, undisputed. They are set out in considerable detail in the decisions of the Board and the Administrative Law Judge ("ALJ"), reported at 256 N.L.R.B. No. 134 (1981). Montgomery Ward operates a two-level department store in the Yorktown Shopping Center, a large, enclosed shopping mall in Lombard, Illinois. Retail sales facilities open to the public, including a "Buffeteria," are located on the upper level; the lower level contains, in addition to retail sales facilities, two credit service centers and a credit operating center (the "credit center" or "credit centers"). The credit centers are not open to the public as are the retail sales facilities, although there is a conference area adjacent to the centers where customers may discuss their credit accounts with center employees.

After receiving an inquiry from a credit center employee, the Union began its organizational efforts among the credit center employees in November 1977. By letter dated November 12, 1977, the Union informed

Leonard Hunlock, manager of the credit center, of the organizational drive. Several days later, union organizers Regina Polk and John Garcia met after work with several employees of the credit center in a restaurant adjacent to the shopping mall. In response to a request by the employees, Polk and Garcia agreed to have lunch with a group of credit center employees at noon on December 2, 1977, in the Montgomery Ward Buffeteria while the employees were on their one-half hour lunch breaks.

On the morning of December 2, Polk and Garcia stood on the sidewalk (owned by Montgomery Ward) in front of the store and distributed union literature. Reed Harvey and Douglas Ruhl, the personnel and operating managers, respectively, of the credit center observed Polk and Garcia distributing literature. Hearing "through the grapevine" that the Union organizers would meet several credit center employees in the Buffeteria at lunch, Harvey and Ruhl also arranged to eat their lunch in the Buffeteria so that they could monitor the organizers' actions.

The Buffeteria where the organizers and employees planned to meet is a cafeteria-style restaurant, operated by Montgomery Ward as part of a separate food service department. Customers select food and beverages from a self-service display area, place the items on a tray and pay for their purchases at cash register stations; there are no waiters, waitresses or table service, and there is no counter where customers may sit and eat. Movable tables, which seat two persons each, are arranged in groups of two to four and are available for use by customers to eat in the Buffeteria.[1] Aisles three to three and one-half feet wide separate the groups of tables from one another. Customers may enter the Buffeteria either directly from the mall or from the Montgomery Ward parking lot; there is no access to the Buffeteria directly from the Montgomery Ward retail store area. Employees

[1] The total seating capacity of the Buffeteria is 170.

of Montgomery Ward may eat in the Buffeteria, and they are treated in the same way as other customers, receiving no special discounts.[2] In fact, ten to twenty percent of the sales volume in Montgomery Ward's Yorktown Buffeteria is attributable to Montgomery Ward employees.[3]

Union organizers Polk and Garcia entered the Buffeteria at noon on December 2, and, upon seeing that the credit center employees they planned to meet were already seated at tables eating their lunches, went directly to a table adjacent to the employees. The Buffeteria was about half full at this time, and the patrons nearest the organizer-employee group were seated about fifteen feet away. The organizers chatted briefly with the employees and, upon request by an employee, distributed union authorization cards. Harvey and Ruhl, who had been standing in the self-service line, observed Polk and Garcia enter the Buffeteria and sit down with the credit center employees. Harvey and Ruhl immediately approached the organizer-employee group and asked to speak to the organizers.

Harvey, Ruhl and the union organizers then left that Buffeteria and went into an aisle in the store area (but still within sight of the credit center employees who remained seated at their table). After exchanging introductions, Harvey told the organizers that they were

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[2] The only eating-room facility available to the credit center employees on Montgomery Ward premises is the Buffeteria, although on weekends during the Christmas season another room is made available for employees eating brown-bag lunches. Moreover, the Buffeteria is the only source of ready-to-eat food in the Montgomery Ward store other than several vending machines. Several other restaurants and eating facilities are located in other stores within the mall, the closest being a ten minute walk for the credit center employees. Credit center employees testified that, because of their short lunch break, they usually did not eat lunch at facilities outside Montgomery Ward premises.

[3] Sales volume at the Yorktown Buffeteria in 1977 was $170,000.00.

trespassing on Montgomery Ward property and violating company policy by soliciting employees; Harvey told the organizers that if they did not leave, he would ask the police to remove them. Polk and Garcia stated that they would not leave because they thought Harvey's request violated the employees' rights, and they returned to the table where they had been sitting. After discussing the incident with the organizers, the employees left; and Polk and Garcia purchased some food at the self-service counter and returned to the table they had occupied before. In the meantime, Harvey called the police.

After two uniformed police officers arrived, Harvey and Ruhl, accompanied by the police officers, sat down at the union organizers' table. Harvey told the organizers that they could finish eating their lunches but, if they spoke to any employees or refused to leave after eating, he would sign a complaint against them and have them removed. The policemen took the organizers' names and addresses, and then left; Harvey and Ruhl remained seated at a table next to the organizers, watching them finish their lunches. About ten minutes later, the organizers left the Buffeteria, accompanied by Harvey, Ruhl and a plainclothes security guard. The Union filed this unfair labor practices charge five days later on December 7, 1977.

The Union's efforts at contacting the employees after the Buffeteria incident were not very successful. When the organizers distributed union literature on the sidewalks next to the store, Montgomery Ward called the police to remove them on at least two occasions.[4] The Union was also unsuccessful in gathering information about the credit center workforce. Employees sympathetic to the Union were unable to secure a complete list of credit

[4] The Union and Montgomery Ward also exchanged letters in which Montgomery Ward refused to grant the Union's request for access to its premises and for a list of credit center employees. Montgomery Ward also rejected the Union's assertion that enforcement of the no-solicitation policy violated federal labor laws.

center employees. Further, the Union was unable accurately to identify (by license number) cars belonging to credit center employees after Montgomery Ward told the credit center employees to park in a new area where their cars were interspersed with automobiles belonging to other employees and customers.

The General Counsel argued before the ALJ that Montgovery Ward's discriminatory enforcement of the no-solicitation rule in the Buffeteria, together with its actions in calling the police to remove the union organizers and in conducting surveillance of the organizers while they were in the Buffeteria, violated section 8(a)(1) of the Act. The ALJ agreed that Montgomery Ward's enforcement of the no-solicitation rule, assuming that it was facially valid, was unlawful because "a purpose of [Montgomery Ward's] rule against solicitation by non-employees was to discriminate against 'solicitation' of non-Buffeteria employees by union organizers where, as here, such 'solicitation' was part of an orderly, discreet conversation by appointment with willing employee patrons over tables where they were eating during their unpaid lunch periods." 256 N.L.R.B. No. 134, ALJ's decision at 19. The ALJ also concluded that Montgomery Ward's surveillance of the organizers and resort to the police constituted independent violations of section 8(a)(1). But the ALJ refused to rule on the "essentially theoretical question" whether Montgomery Ward could lawfully enforce a no-solicitation rule, even if enforced in a nondiscriminatory manner, to the extent of forbidding nonemployee union organizers from meeting with off-duty employees in the Buffeteria.

The Board, while approving and adopting the ALJ's decision, went one step further and addressed the "theoretical question" involving the facial validity of Montgomery Ward's no-solication rule as applied to the Buffeteria. Relying on its decision in *Marshall Field & Co.*, 98 N.L.R.B. 88, *modified on other grounds and enforced*, 200 F.2d 375 (7th Cir. 1952), the Board agreed with the contention of the General Counsel and the Union "that even a nondiscriminatory no-solicitation rule . . . [,]

applied in a manner to prohibit nonemployee union organizers from meeting with off-duty employees in a department store restaurant, [when] they conduct themselves in a manner consistent with the purpose of the restaurant," was unlawfully broad. 256 N.L.R.B. No. 134 at 2. Montgomery Ward's petition for review and the Board's cross-application for enforcement followed.

II.

It is important to note that the case at hand involves two sets of rights which are analytically separable and which have resulted in two strands of legal doctrine: the rights of nonemployee union organizers to gain access to an employer's premises in order to solicit employees and the rights of the employees themselves to solicit and be solicited when they are off duty. The standard governing the access of nonemployees who wish to distribute union literature or solicit on behalf of a union was described by the Supreme Court in *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956):

> It is our judgment . . . that an employer may validly post his property against nonemployee distribution of union literature if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message and if the employer's notice or order does not discriminate against the union by allowing other distribution. . . . But when the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels, the right to exclude from property has been required to yield to the extent needed to permit communication. . . .[5]

[5] Although *Babcock & Wilcox* dealt with distribution of union literature, the Court has applied this rule in solicitation cases as well. *See Central Hardware Co. v. NLRB*, 407 U.S. 539 (1972).

To analyze the circumstances of this case, however, the *Babcock & Wilcox* "access rule" must be supplemented by the set of legal standards developed by both the NLRB and the Supreme Court to govern "no-solicitation" rules, *i.e.*, rules governing the right of an employer to proscribe, in general, the solicitation of his employees. Both the Supreme Court and the Board have long recognized "that the right of employees to self-organize and bargain collectively established by § 7 of the [Act], necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491 (1978) (footnote omitted); *accord Central Hardware Co. v. NLRB*, 407 U.S. 539, 542-43 (1972). But the right to effective communication at the jobsite may conflict with the undisputed rights of employers to direct their workforce and to control access to their property. *See Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-98 (1945). Solicitation of employees for union membership at the jobsite and access of union organizers to a jobsite for the purpose of soliciting union membership are two subjects upon which the Court has directed the Board to establish standards which accommodate the respective interests of employees and employers "with as little destruction of one as is consistent with the maintenance of the other." *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

In striking this balance, the Court has directed that an employer's rule prohibiting union solicitation by employees on the employer's property during nonworking hours is to be considered presumptively invalid, although a rule prohibiting solicitation during working hours is presumptively valid. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 803 & n.10 (1945), approving the doctrine expressed by the Board in *Peyton Packing Co.*, 49 N.L.R.B. 828, 843-44 (1943), *enforced*, 142 F.2d 1009 (5th Cir.), *cert. denied*, 323 U.S. 730 (1944).[6] As an

[6] Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. . . . It

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exception to this general presumption, however, the Board has approved rules prohibiting union solicitation in the "selling areas" of restaurants and stores even during nonworking hours, reasoning that such solicitation, if disruptive, would unreasonably interfere with the employer's business of serving customers. *See, e.g., May Department Stores Co.*, 59 N.L.R.B. 976 (1944), *enforced as modified*, 154 F.2d 533 (8th Cir.), *cert. denied*, 329 U.S. 725 (1946); *McDonald's Corp.*, 205 N.L.R.B. 404 (1973).

Although in most cases the Board and the courts can rely on this exception for selling areas to determine the validity of a no-solicitation rule applied to employees in restaurants on their off-duty time, "the fact that an establishment is a restaurant or a store does not automatically allow [the employer] to impose a broad no-solicitation rule." *NLRB v. Silver Spur Casino*, 623 F.2d 571, 582 (9th Cir. 1980), *cert. denied*, 451 U.S. 906 (1981), *reh'g denied*, 452 U.S. 931 (1981). In each case, the Board in the first instance must strike "the appropriate *balance* between organizational and employer rights in the particular industry to which each [no-solicitation rule] is applicable," and we shall defer to the Board's balancing if it is supported by substantial evidence. *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 506 (1978) (emphasis in original); *see id.* at 504, 506. The general standards developed by the Board and the courts thus do not purport to be universally dispositive of every case but frequently serve only as guidelines which help to determine whether on balance the policies of the Act should give way to property or other interests.

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[6] *continued*

is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property.

Peyton Packing Co., 49 N.L.R.B. at 843-44.

III.

Claims involving no-solicitation rules generally arise in one of two circumstances: (1) an employer may violate section 8(a)(1) by discriminatorily adopting or enforcing an otherwise valid no-solicitation rule, or (2) absent discriminatory enforcement, an employer may violate section 8(a)(1) by maintaining and applying a facially invalid no-solicitation rule. *See, e.g., Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255 (7th Cir. 1980) (discriminatory enforcement of otherwise valid no-solicitation rule); *NLRB v. Roney Plaza Apartments*, 597 F.2d 1046 (5th Cir. 1979) (even if applied nondiscriminatorily, no-solicitation rule was overbroad and invalid); *NLRB v. Gale Products, Division of Outboard Marine Corp.*, 337 F.2d 390 (7th Cir. 1964) (no-solicitation rule was facially valid and impartially applied).[7] In the case before us, the ALJ found, and the Board agreed, that Montgomery Ward discriminatorily enforced its rule, thus violating section 8(a)(1). Having based her conclusion on the existence of discrimination, the ALJ declined to rule on the "theoretical" question whether Montgomery Ward could maintain and enforce the rule even in a nondiscriminatory manner. The Board, however, considered this "theoretical" question and concluded that the rule was facially invalid even if applied nondiscriminatorily to prohibit nonemployee organizers from meeting with off-duty employees in the Buffeteria. Thus, we must consider Montgomery Ward's no-solicitation rule under theories of lia-

[7] Although a section 8(a)(1) violation is usually established by proof that an employer's actions might reasonably tend to coerce, restrain or interfere with the exercise of protected rights by employees, *see NLRB v. Berger Transfer & Storage Co.*, 678 F.2d 679, 689 (7th Cir. 1982), courts have usually required that there be some evidence of discrimination in the enforcement of a no-solicitation rule before such enforcement will be held to violate section 8(a)(1). *See, e.g., NLRB v. Babcock & Wilcox*, 351 U.S. 105, 112 (1956); *NLRB v. Publishers Printing Co.*, 625 F.2d 746 (6th Cir. 1980); *NLRB v. Sunnyland Packing Co.*, 557 F.2d 1157 (5th Cir. 1977); *Revere Camera Co. v. NLRB*, 304 F.2d 162 (7th Cir. 1962).

bility which involve discrimination as well as theories which do not.

Two questions are thus presented for our review: (1) assuming that Montgomery Ward's no-solicitation rule may be validly applied to nonemployees who solicit off-duty employees in the Buffeteria, is there substantial evidence in the record to support the ALJ's conclusion (adopted by the Board) that Montgomery Ward discriminatorily enforced its rule in violation of the *Babcock & Wilcox* standard; and (2) is there substantial evidence in the whole record to support the Board's conclusion, based upon a balancing of employee and employer interests, that Montgomery Ward may not prohibit solicitation of off-duty employees by nonemployees in the Buffeteria even in the absence of discriminatory enforcement?

A.

As to the first issue, we believe that substantial evidence supports the finding that Montgomery Ward discriminatorily enforced its no-solicitation rule in a manner that coerced, restrained and interfered with the exercise of protected rights. Montgomery Ward's no-solicitation rule proscribes any form of solicitation while the employees are on "Company time," and it forbids solicitation by nonemployees on Company property at all times.[8] The

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[8] DISTRIBUTION OF LITERATURE AND SOLICITATION ON COMPANY TIME FOR NON-COMPANY ACTIVITIES

Employees may not distribute union literature or solicit membership in unions, or fraternal, religious, social, or political organizations on Company time, or while employees to whom literature is being distributed, or whose membership is being solicited, are on Company time. Company time is that time which the employee is scheduled to be on duty and for which the employee is being paid, excluding rest periods, lunch periods, and time before and after the employee's working day.

Solicitation by employees is permitted on Company property so long as the employees, both soliciting and those being solicited, are on their own time and the solicitation is con-

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context in which that broad rule was enforced here suggests, without more, that its application was almost necessarily discriminatory. Thus the facts before us involve an essentially private conversation in a restaurant open to the public, between off-duty employees and organizers who have come to the restaurant at the request of the employees. It is difficult, if not impossible, to envisage how a no-solicitation rule as broad as Montgomery Ward's could be applied to such a situation in a non-discriminatory manner. In the case at hand, the employer's representatives approached the seated group only because they knew in advance that Polk and Garcia were union organizers. In other situations most customers would obviously find it offensive for Montgomery Ward to monitor their conversations to guard against solicitation in a wide variety of circumstances *not* involving labor organization. Yet such monitoring appears to be the only way Montgomery Ward could effectively and

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[8] *continued*

ducted in a quiet and orderly manner and does not interfere with the operation of the Company's business. Meetings or speeches are not to be permitted; solicitation which results in disturbing or interfering with the work or function of any of the employees or department is forbidden; solicitation which is detrimental to maintaining the premises in a clean and attractive condition is forbidden.

. . .

It is a violation of the Company's No Solicitation rule either to solicit or be solicited in a manner prohibited by this rule.

Solicitation for charity drives and fund raising campaigns are to follow the guidelines for solicitation as outlined above. The Company generally supports one all-out community charity drive. Prior approval is required for any additional charity drive held on Company property. There are times when expressions of friendship and goodwill for co-workers are permissible, but in order to protect employees from too frequent collections for such purposes written permission for such solicitation must be obtained from the store manager or personnel manager.

Any violations of the Company No Solicitation rule should be reported at once to your immediate supervisor or a store staff member.

nondiscriminatorily enforce the rule in the Buffeteria. If a solicitation took place discreetly in the course of a luncheon conversation, we very much doubt that Montgomery Ward would risk the sort of customer disruption which took place in this case, where police were called to remove two Buffeteria patrons from the premises, in order to enforce the no-solicitation rule against solicitation not involving labor organization.

Indeed, the testimony of the employer's representatives, Harvey and Ruhl, indicated (and the ALJ found) that the rule here was enforced against these union organizers only because they solicited for union membership. According to Harvey, he approached the table where the union organizers were seated because he "assumed they were there for union solicitation"; but he further testified that he had never approached any other group in the Buffeteria in a similar attempt to enforce the no-solicitation rule. Although Montgomery Ward officials claimed that the purpose of the no-solicitation rule was to prevent customer disruption and interference, both Harvey's and Ruhl's testimony indicates that they enforced the rule on December 2 not to halt any imminent threat to customer convenience but only because, as Harvey stated, "soliciting for union membership was contrary to company policy." *Cf. Marshall Field & Co. v. NLRB*, 200 F.2d 375, 382 (7th Cir. 1952) (approving employer's banning of solicitors from selling areas when they acted in "loud and rowdy" manner).

Moreover, there was other evidence which demonstrates that Montgomery Ward disparately enforced this rule against the Union. Although the no-solicitation rule was ostensibly in effect on December 2, 1977, the ALJ found that Montgomery Ward did not post the rule until several days after the incident in the Buffeteria. This failure to post the rule suggests that Montgomery Ward's purpose was to interfere with organizational activity. *See NLRB v. Montgomery Ward & Co.*, 554 F.2d 996, 1000 (10th Cir. 1977). There is further evidence of discrimination in the testimony of Montgomery Ward officials who, in the words of the ALJ, indicated that when enforcing the rule

in the Buffeteria, "the scope of the ban on solicitation of employees depends partly on the kind of organization being solicited for." 256 N.L.R.B. at 17 (ALJ's opinion). For example, Harvey testified that he was unsure whether he would prohibit solicitation in the Buffeteria on behalf of the Girl Scouts or the American Bar Association, but on December 2 he demonstrated no hesitancy when union solicitation was involved. Moreover, Montgomery Ward actually tolerated solicitation in violation of the rule, as exemplified by the activities of employee Simmons, who admitted soliciting fellow employees on work time to buy cosmetics and jewelry. *See Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255 (7th Cir. 1980). In addition, union organizers were expelled from Montgomery Ward property (and in one instance arrested) after December 2 when they distributed union literature on a private sidewalk *outside* the store area, even though Montgomery Ward's no-solicitation rule apparently allows solicitation there.[9] In sum, there is substantial evidence to support the finding that Montgomery Ward discriminatorily enforced its no-solicitation rule to bar access to these nonemployee union organizers in violation of section 8(a)(1). *See Babcock & Wilcox*, 357 U.S. at 112. Although some of this evidence may be simply the product of the inherent difficulty of monitoring private conversations in the Buffeteria, we think this difficulty ought properly to be considered in deciding whether the rule was (or could be) enforced in a nondiscriminatory manner.

B.

Having found that Montgomery Ward's no-solicitation rule was discriminatorily applied in this case, we turn now to the question whether the solicitation which occurred could lawfully be prohibited, even in the absence

[9] The no-solicitation rule bans solicitation by nonemployees only in the store and other *store buildings*. Although technically trespassers, the union organizers were apparently not acting in violation of the rule as posted when they distributed literature *outside* the store.

of discrimination. It is our conclusion that substantial evidence supports the Board's finding that Montgomery Ward may not enforce its no-solicitation rule in the Bufeteria under the circumstances of this case and thus that the rule is unlawfully over-broad insofar as it prohibits the organizational activities which occurred here.

In reaching this conclusion, we have attempted to face squarely the crucial question of the applicability of *Babcock & Wilcox* to the circumstances before us. The Board argues that *Babcock & Wilcox* is not controlling here, since the property involved was open to the public. Montgomery Ward argues, on the other hand, not only that *Babcock & Wilcox* applies, but also that the "test" or "standard" prescribed in that case prohibits the Board from taking account of the balance of interests absent a preliminary finding that employees are inaccessible to organizational communication by other means. In order to resolve this basic controversy as to the proper standard governing the facts before us, we must examine *Babcock & Wilcox* in depth.

Babcock & Wilcox involved the distribution of literature by nonemployee union organizers in the parking lot of a factory in the early 1950s. The factory was located one mile from a town of 21,000 people, where 40% of the 500 employees lived; the rest of the employees lived within a 30-mile radius. 351 U.S. at 106. In holding that the parking-lot distribution could be prohibited in the absence of discrimination or of a showing that union access to the employees was otherwise impossible, the Court emphasized that "[t]he plants are close to small well-settled communities where a large percentage of the employees live." *Id.* at 113. The heart of the *Babcock & Wilcox* analysis was the Court's conclusion that the competing interests found in the particular context must be balanced:

> This is not a problem of always open or always closed doors for union organization on company property. Organization rights are granted to workers by the same authority, the National Government, that preserves property rights. Accommodation between the two must be obtained with as little de-

> struction of one as is consistent with the maintenance of the other.

Id. at 112. The determination of the proper adjustment of interests, said the Court, rests with the Board; but the Board had erroneously used the standard applicable to solicitation by *employees* in a situation involving access to the employer's property by *nonemployees*. *Id.* at 113. The Board had thus failed to make an important factual distinction central to the proper balance of interests in *Babcock & Wilcox*.

Babcock & Wilcox has been described as imposing a two-prong test: there must be a showing either of discrimination or of difficulty of alternative union access. But we believe the *Babcock & Wilcox* standard cannot be oversimplified and must always involve a process of balancing or accommodating of interests in circumstances where nonemployee access is the issue. The two prongs relevant on the *Babcock & Wilcox* facts really incorporate such a balancing. If, on the one hand, a no-solicitation rule is enforced in a discriminatory fashion, that fact goes to the weight of the employer's interest: if non-union solicitation is permitted, does the employer *really* care about the impact of this activity itself upon his property or managerial rights? On the other hand, in a situation where employees are not reasonably accessible by alternative means to union organizational efforts, the weight to be placed on their organizational rights and interests grows heavier; and the employer's property interest must then yield to this very much heightened significance of the organizational interests implicated.

The approach mandated by *Babcock & Wilcox* cannot, by its very nature, be applied in a mechanistic fashion. The two-prong "rule" which emerged from that approach in the *Babcock & Wilcox* case had a precise "fit" in a factory situation in a small community in the 1950s. But the same "rule," woodenly applied, does not necessarily fit the circumstances of a workplace open to the public in a shopping center in a major metropolitan area in the 1980s. Yet the apparent lack of fit does not mean that *Babcock & Wilcox* does not "apply" to the circumstances of the case before us. *Babcock & Wilcox* must be an im-

portant starting point for analysis of any solicitation activity by nonemployees. The rationale of *Babcock & Wilcox* controls such activities even when the facts are as distinguishable as those found here, but these distinct circumstances profoundly affect the balance of the interests served.

We must, therefore, reject both the Board's contention that *Babcock & Wilcox* does not apply where access to the employer's premises is open to the public and Montgomery Ward's argument that the Board may not undertake to balance interests unless there is a preliminary finding of inaccessibility to the union. Both those circumstances—public access to the premises and difficulty of access by the union to the employees—are significant to the balance of property and organizational interests; but there must still be a balancing—or accommodation—in order to reach a just and workable result. And it is important to remember that the standard ultimately being applied is that of the National Labor Relations Act, which *Babcock & Wilcox* articulates but cannot easily and precisely define for all places and all times.

The Supreme Court's post-*Babcock & Wilcox* cases involving union solicitation indicate that our approach to *Babcock & Wilcox* is correct. Thus, in *Hudgens v. NLRB*, 424 U.S. 540 (1976), the Court reiterated that the accommodation of § 7 rights and property rights was the core of *Babcock & Wilcox*, as, indeed, of the National Labor Relations Act itself, and that the proper accommodation of the two rights depended in each instance upon the context and the organizational activity involved:

> The *Babcock & Wilcox* opinion established the basic objective under the Act: accommodation of § 7 rights and private property rights "with as little destruction of one as is consistent with the maintenance of the other." The locus of that accommodation, however, may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context. In each generic situation, the primary responsibility for making this ac-

> commodation must rest with the Board in the first instance.

424 U.S. at 522 (citations omitted).[10]

The *Beth Israel* case presents an example of the sensitive attention which the Supreme Court reserves for the particular context of a case involving solicitation activity. *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978). Although nonemployees were not involved, the Court regarded as central to the balance struck under the Act that the context was a hospital and that patients were present in the cafeteria where solicitation and distribution occurred. Nonetheless, the Court invalidated the hospital's no-solicitation rule as applied to the cafeteria, emphasizing again that it was the Board's task to evaluate the relative strength of the interests involved and to balance them. 437 U.S. at 503.

In the case at hand, the Board considered the various interests involved and mandated an accommodation which would allow solicitation by nonemployees in the Buffeteria when such organizational activity was carried on in a nondisruptive fashion consistent with the normal use of the restaurant. Our task is limited to reviewing whether the record contains substantial evidence to support those findings. *Beth Israel Hospital v. NLRB*, 437 U.S. at 507, citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951). We conclude that it does.

On the one hand, the weight of the employees' interest here is substantially increased by the fact that there are

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[10] In *Hudgens*, which involved picketing, the employer urged that *Babcock & Wilcox* controlled; the union argued that a statutory standard (not *Babcock & Wilcox*) governed, since the activity in question was not organizational; and the Board urged that a first amendment standard should be applied. In its remand to consider the case under the statutory criteria alone, the Court apparently identified the *Babcock & Wilcox* standard with those criteria, but directed the Board to take account of the relevance of the fact, among others, that strike activity rather than organizational conduct was involved. 424 U.S. at 522-23.

major obstacles to access to them by union organizers.[11] The setting is a large shopping mall surrounded by highways. Presumably it would be difficult to follow the employees to their homes. The employees usually eat on the premises and have only a one-half hour break for lunch; the nearest restaurant facilities are a ten minute walk. The union was not given a list of the names of credit center employees and could not identify their cars in the parking lot.

On the other hand, the employer's legitimate property interests, in the circumstances of this case, are minimally implicated. The union organizers became "trespassers" not because of anything about their activities inconsistent with normal use of the Buffeteria but because Montgomery Ward managers discovered their identity, intervened in their conversations and invoked the no-solicitation rule. The organizers presumably would be invitees rather than trespassers to the extent that they merely entered the Buffeteria to have lunch with acquaintances.[12]

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[11] Although *Babcock & Wilcox* commands that "if the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them, the employer must allow the union to approach his employees on his property," 351 U.S. 105, 113, this case was not argued as an "access" case under *Babcock & Wilcox*. We have doubts whether reasonable efforts by the union would in fact have enabled it to reach the employees with its message; at least, the difficulties would have been very substantial. Since the parties have not posed the issue exactly in these terms, however, we do not decide what the outcome would have been on the issue of access alone. Nonetheless, in accordance with our reading of *Babcock & Wilcox*, discussed above, access is an important factor in evaluating the strength of the competing interests at stake in a specific situation.

[12] This fact, *inter alia*, serves to distinguish the case at hand from that involved in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978). At issue in *Sears* was the question whether federal law preempted state jurisdiction in a situation involving a right arguably protected by the National Labor Relations Act. The activity in question was "area standards" picketing, that is, picketing by the

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Thus the employer's interests are almost exclusively managerial: the prevention of disruption of business and of inconvenience to customers or to other employees. And under the circumstances here, it does not seem that these interests were affected at all. The organizers and employees were in no way distinguishable from other members of the general public. Their conduct was consistent with that of the other Buffeteria patrons. They conversed in voices inaudible to the other patrons; they did not attempt to talk with anyone outside the planned luncheon group, did not distribute literature and did not move among the tables. The Buffeteria was only about half full at the time, so the union organizers did not tie up tables which might otherwise have been available to conduct a larger volume of business. There is no evidence that the solicitation in any way interfered with the ordinary functioning of the Buffeteria or with customer relations. Indeed, the only disruption involved was the consequence of the enforcement of the no-solicitation rule—the calling of police into the restaurant.

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[11] *continued*

carpenters' union because carpentry work in a Sears store was being performed by men who had not been dispatched from the union's hiring hall. The picketing took place on Sears' private walkways and parking lot, and the company sought in a state trespass action to remove the picketing to public sidewalks. Thus the question of trespass came naturally to the fore in *Sears*, as it had in *Babcock & Wilcox*.

In circumstances such as those presented here, the trespass issue is not presented in the same way. The organizers' status as "trespassers" or "invitees" under state property law can be made to turn entirely upon the property owner's desire as an employer to prevent communications about labor organization. This sort of analysis, however, must lead to circular reasoning since a business invitation can be withdrawn as soon as the employer is aware that its recipients are union organizers, and the entrants are thereby converted into "trespassers." We presume, therefore, that the Supreme Court's language about "trespassory" activity in the *Sears* opinion refers essentially to the fact that the premises were not being used in a manner consistent with their normal business use. This is not the situation here.

In short, there is substantial evidence to support the Board's conclusion that Montgomery Ward's no-solicitation rule cast its net too wide when it prohibited solicitation of off-duty employees in a restaurant open to the public—albeit on the employer's premises—when that restaurant was being used nondisruptively and in a manner consistent with its normal use.

The Board's conclusion here follows from its prior decision in *Marshall Field & Co.*, 98 N.L.R.B. 88, 93-94, *modified on other grounds and enforced*, 200 F.2d 375 (7th Cir. 1952). In *Marshall Field* the Board also rejected an employer's argument that it could lawfully prohibit all solicitation in its public restaurant, even if the solicited employees were off duty, explaining that:

> While it is true that sales of merchandise, in this case food, are made to customers in the restaurants, the situation with regard to store restaurants is otherwise markedly different from that existing in the admittedly selling portions of the store. Customers patronizing the restaurants, for the most part, are placed at separate tables and are served by restaurant employees who are not, and who have not been, the subject of solicitation by the charging Union. The comparative isolation of customers from each other, coupled with the fact that no solicitation is carried on among employees on duty in the restaurants, make remote the possibility of substantial interference with the [employer's] business by solicitation of off-duty employees.

98 N.L.R.B. at 94 (footnote omitted). In *Marshall Field* the Board went on to find that the employer could lawfully impose limited restrictions "designed to insure that solicitation is carried on in the public restaurants *only as an incident to normal use* of such facilities." 98 N.L.R.B. at 94 (emphasis supplied). The restrictions approved by the Board in that case (which were the restrictions actually enforced by the employer) allowed nonemployee union organizers to meet with off-duty employees only by appointment in the restaurant; prevented organizers from moving from table to table when soliciting; and required that any solicitation be carried out discreetly.

Marshall Field is almost on all fours with the case before us. As in the public restaurant in *Marshall Field*, the patrons of the Buffeteria sit at small groups of tables, which are separated from one another. Moreover, the off-duty employees being solicited here, as in *Marshall Field*, do not work in the Buffeteria.[13] Indeed, the one apparent difference between the Buffeteria and the restaurants in *Marshall Field*—the lack of table service in the Buffeteria—suggests to us that the Buffeteria offers even less chance of disruption since in the Buffeteria union organizers could have only minimal contact with *on-duty* employees.

Montgomery Ward argues that the Board's decision in the case at hand is somehow invalidated by its reliance on the *Marshall Field* case, which predated *Babcock & Wilcox*. For a number of reasons, we find no merit in this argument. First, the argument is tied to a restrictive interpretation of *Babcock & Wilcox* which we have, as indicated, rejected. Without the restrictive gloss that difficulty of alternative means of access by the union is a prerequisite to lawful solicitation, *Marshall Field* can be seen as a case in which the Board balanced competing interests in a manner similar to the Supreme Court in *Babcock & Wilcox*. It is also noteworthy that the Board has in several more recent decisions invalidated no-solicitation rules applied to off-duty employees in restaurants.[14] In 1966, the Board struck down Montgomery Ward's earlier unwritten no-solicitation rule as overbroad in an incident at another location involving a meeting between an employee after work and a union representative in the store

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[13] This fact distinguishes both *Marshall Field* and the case before us from *McDonald's Corp.*, 205 N.L.R.B. 78 (1973) and *Goldblatt Bros., Inc.*, 77 N.L.R.B. 1262 (1948), where the restaurant employees were within the group of employees being actively solicited by the union. The Board also noted in *Goldblatt Bros.* that many customers sat at a counter in the store restaurant; there is no counter service in Montgomery Ward's Buffeteria.

[14] *See Marriott Corp.*, 223 N.L.R.B. 978 (1976) (solicitation in nonpublic areas of cafeteria); *Bankers Club, Inc.*, 218 N.L.R.B. 11 (1975) (solicitation permissible in banquet room when no customers are present).

restaurant, rejecting the argument that the restaurant was a public sales area, since the two men "were as much entitled under the circumstances at the time to patronize the restaurant as any other members of the general public." *Montgomery Ward*, 162 N.L.R.B. 369 (1966).

In short, the Board has carefully considered and balanced the relevant competing interests in this case; and we will not disturb its conclusion that the no-solicitation rule is invalid as applied to off-duty employees meeting nonemployees in the Buffeteria. Although a ban on solicitation in restaurants may amount to an appropriate assertion of property or management rights in restaurants where customer convenience may be compromised if disruptive union solicitation is allowed, the facts in the case before us do not justify such a ban. The usual and usually justifiable concerns surrounding solicitation in public areas open to customers—disruption of the business and inconvenience to customers—simply are unjustified here. There is no danger that entirely private and unobtrusive solicitation such as that which occurred in this case will interfere with Montgomery Ward's business of serving customers.

The very circumstances which make it impossible for Montgomery Ward to enforce its rule in the Buffeteria in a nondiscriminatory manner—the inability to *detect* discreet solicitation over lunch—make it inappropriate to enforce such a rule, even if considered nondiscriminatory. There is virtually no burden on any property right or managerial right to be balanced against the heavy burden on the organizational rights of these almost inaccessible employees. The facts here fully support enforcement of the Board's order.

IV.

Montgomery Ward also argues that the Board erred in concluding that it had violated section 8(a)(1) by undertaking surveillance of the nonemployee organizers and by threatening police action to remove the organizers. We agree with the Board, however, that Montgomery Ward's interruption of the organizer-employee meeting, followed

by continued surveillance of the organizers, might reasonably tend to inhibit the exercise by credit center employees of their protected rights. *See Midwest Stock Exchange, Inc. v. NLRB*, 635 F.2d 1255, 1268 (7th Cir. 1980); *NLRB v. Intertherm, Inc.*, 596 F.2d 267 (8th Cir. 1979). Although an employer may in some cases keep a union organizer under observation to insure there is no disruption of its business, Montgomery Ward went far beyond allowable scrutiny of activities on its premises by interfering with organizers who were meeting with off-duty personnel in a nondisruptive fashion and by engaging in unreasonably close "observation" of these organizers as they finished their lunches. Moreover, since the organizers, as we have found, were lawfully on the premises engaging in protected activities with employees, Montgomery Ward's threat of police action reasonably tended to interfere with the employees' exercise of section 7 rights, in violation of section 8(a)(1). *See generally First Lakewood Associates v. NLRB*, 582 F.2d 416 (7th Cir. 1978).

V.

We conclude that Montgomery Ward violated section 8(a)(1) by promulgating and discriminatorily enforcing a no-solicitation rule which barred nonemployee union organizers from meeting with off-duty credit center employees in the Buffeteria, and further violated section 8(a)(1) by threatening police action and engaging in unwarranted surveillance of protected activities. We grant enforcement of the Board's order and dismiss the petition for review.

ENFORCEMENT GRANTED

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Opinion by Judge Cudahy

NLRB JUDGMENT—ORAL ARGUMENT

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

November 10, 1982.

Before

Hon. WALTER J. CUMMINGS, Chief Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. WILLIAM G. EAST, Senior District Judge*

No. 81-2501

MONTGOMERY WARD & COMPANY, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

WAREHOUSE MAIL ORDER, OFFICE, TECHNICAL AND PROFESSIONAL EMPLOYEES LOCAL 743, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
Intervening-Respondents.

On Administrative Review of an Order of the National Labor Relations Board.

This cause came on to be heard on the record from the National Labor Relations Board, and was argued by counsel.

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* The Honorable William G. East, Senior District Judge for the District of Oregon, is sitting by designation.

On consideration whereof, it is ordered and adjudged by this Court that enforcement of the order of the National Labor Relations Board reviewed in this matter be, and the same is hereby, GRANTED, with costs, in accordance with the opinion of this Court filed this date.

FJZ

256 NLRB No. 134

D-7825
Lombard, IL

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

MONTGOMERY WARD & COMPANY, INC.

and

Case 13—CA—17109

WAREHOUSE, MAILORDER, OFFICE, TECHNICAL, AND PROFESSIONAL EMPLOYEES, LOCAL NO. 743, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

DECISION AND ORDER

On January 25, 1980, Administrative Law Judge Nancy M. Sherman issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and supporting briefs.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge, as modified herein.

1. The Administrative Law Judge found, and we agree, that Respondent violated Section 8(a)(1) by discriminatorily

maintaining and enforcing its no-solicitation rule[1] against nonemployee organizers in its Buffeteria, a public cafeteria, located in a section of Respondent's department store. However, she did not rule on the contentions raised by the General Counsel and the Union that even a nondiscriminatory no-solicitation rule may be unlawful if applied in a manner to prohibit nonemployee union organizers from meeting with off-duty employees in a department store restaurant, so long as they conduct themselves in a manner consistent with the purpose of the restaurant. The Administrative Law Judge declined to make this determination, finding it to be a theoretical question only, in view of the impracticality of enforcing such a limitation in a cafeteria where the public is invited to eat, and where all sorts of social conversations ensue, including nonunion solicitation. The General Counsel excepts, contending that the question is not theoretical, and should be decided because of the statutory right involved. We agree with the General Counsel.

Respondent's Buffeteria is a cafeteria type restaurant housed within its retail facility, which is located within an enclosed shopping mall that contains four department stores and several smaller stores. Buffeteria customers sit at movable tables, each seating two people and ordinarily placed together in groups of two to four tables. There is no counter at which customers sit, and there are aisles between the tables of 3 to 3½ feet. Respondent's employees, from whom the restaurant derives about 10 to 20 percent of its sales, pay full price for their food and are treated the same as members of the public. The Administrative Law Judge found that the Buffeteria is the dining facility that enables the credit center employees interested in union organization to spend the most time discussing the Union during their 30-minute lunch breaks. This is based upon the distance to other dining facilities in the mall, the crowds in the mall and at other facilities, and the time saved by the cafeteria format.

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[1] The pertinent section of the rule, which the parties stipulated was in effect at all relevant times, is: "Solicitation by non-employees of the Company is prohibited at all times in the store and store operated buildings."

In *Marshall Field & Company*,[2] the Board held that public restaurants in a retail store are considered nonselling, public areas, rejecting Respondent's contention that it could lawfully prohibit solicitation in its public restaurants because such activity would disrupt its business. The Board's rationale was:

> While it its true that sales that sales of merchandise, in this case food, are made to customers in the restaurants, the situation with regard to store restaurants is otherwise markedly different from that existing in the admittedly selling portions of the store. Customers patronizing the restaurants, for the most part, are placed at separate tables and are served by restaurant employees who are not, and who have not been, the subject of solicitation by the charging Union. The comparative isolation of customers from each other, coupled with the fact that no solicitation is carried on among employees on duty in the restaurants, make remote the possibility of substantial interference with the Respondent's business by solicitation of off-duty employees.[3]

The Board there found Respondent's existing rule lawful because it allowed outside organizers to meet by appointment with off-duty employees in the restaurants, provided the organizers did not move from table to table and conducted themselves discretely. As such the restrictions imposed were lawful and suitable to the particular situation, designed as they were to insure that solicitation was carried on only as an incident to the normal use of such facilities. We find the situation in this case similar to that in *Marshall Field.*

Union Organizers Polk and Garcia met with several credit center employees at another restaurant a few days before the Buffeteria incident occurred. At that meeting they arranged to meet three employees in the Buffeteria at noon, during the employee's lunch break, and to meet other employees at 12:30, the beginning of their lunch break. When Personnel Manager

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[2] 98 NLRB 88 (1952), modified on other grounds and enfd. 200 F. 2d 375 (7th Cir. 1952).

[3] *Id.* at 94

Harvey and Operating Manager Ruhl approached the table at which Polk and Garcia were sitting, they were chatting with the first group of employees with whom they had an appointment. The organizers did not move from table to table, try to distribute literature, speak to employees who were not off-duty, or in any other way create a disturbance. They did not attempt to solicit Buffeteria employees.[4] We conclude, therefore, that they were attempting to use the cafeteria in a manner consistent with its purpose.

In *Montgomery Ward & Co., Incorporated,*[5] the Board found a similar, but unwritten, no-solicitation rule which was an absolute prohibition against outsiders in public sales areas, including the restaurant, to be unlawfully broad.[6] There, the Board struck down the rule itself, because it had been unlawfully promulgated. The written rule in the current *Montgomery Ward* case appears identical in scope to Respondent's unwritten rule in effect in 1964 at its Rome, New York, stores. One of the issues in the earlier case concerned an incident in a store restaurant and involved an employee who had punched out at 6 p.m. and was having coffee with the recording secretary of the Union. The two were told by a supervisor that they were "not permitted to discuss the Union on company property at all and

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[4] The Administrative Law Judge found, and we agree, that the Union had no desire to organize any of Respondent's retail or other employees not employed in the credit center, nor did its representatives speak to or attempt to speak to any of the Buffeteria employees.

[5] 162 NLRB 369 (1966).

[6] See also *Oertle Management Company, Inc. and HFO #11, Inc.*, 182 NLRB 722 (1970), in which the Board reiterated its position in *Montgomery Ward, supra,* disavowing the Trial Examiner's view that the employer, an operator of a department store, could lawfully prohibit solicitation by outsiders in its public cafeteria. It adopted the Trial Examiner's conclusion that the Employer's surveillance was not unlawful only because the evidence did not support a finding that it was for a purpose other than enforcing its rule as to cafeteria employees then working.

they would have to leave if they were going to discuss it further." Then Trial Examiner Downing concluded that the two men "were as much entitled to patronize the restaurant as any other members of the general public." He found that "Respondent orally announced and promulgated an unlawfully broad no-solicitation rule which prohibited all union solicitation on Respondent's premises, in violation of Section 8(a)(1)." (162 NLRB at 379.) The Board adopted that decision without comment on this issue.

We conclude that the written rule in the current case is likewise an unlawfully broad no-solicitation rule, prohibiting all union solicitation on Respondent's store premises. Respondent in its brief consistently refers to what it considers the appropriate rule for "selling areas" and avoids the distinction recognized by the Board in the 1966 *Montgomery Ward* case, to wit, that prohibiting all union solicitation on department store premises, including a store's public restaurants, constitutes an impermissibly broad rule, in violation of Section 8(a)(1) of the Act.

Respondent urges the applicability of *N.L.R.B.* v. *The Babcock & Wilcox Company,* 351 U. S. 105 (1956), with its requirement—in the context of a manufacturing plant facility to which the public is not invited—that access to an employer's plant premises may be denied organizers unless they can demonstrate significant difficulty in reaching the employee complement with their message. On this issue the General Counsel has anticipated that Respondent, in its brief, might urge the applicability of *May Department Store Company d/b/a Meier & Frank Co.,* 198 NLRB 491 (1972), wherein the Board applied the Supreme Court's language in *Babcock* to the effect that the Act does not require that an employer permit the use of its facilities for organization when other means are readily available. That, however, was a case where the Board noted the lack of contention that the no-solicitation rule discriminated against the Charging Party, as well as the fact that the Employer had permitted the distribution of leaflets by the

Union on numerous occasions at the employee entrance. We find merit in the contention of the General Counsel that the *Babcock & Wilcox* rationale typically controls in situtations where union organizers use "private" property to which the public is not invited in a manner inconsistent with the property's intended purpose, rather than use of a public restaurant for personal discussion while dining.[7]

2. The Administrative Law Judge found that Respondent violated Section 8(a)(1) by engaging in surveillance of Union representatives Polk and Garcia while they were soliciting in the Buffeteria. As she relied upon *W. T. Grant Company*,[8] we interpret her finding, consistent with that decision, as involving surveillance of employee and union organizer actions and association having a tendency to inhibit employee interest and participation in unionization.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, we shall order that it cease and desist therefrom and from any like or related conduct, and that it take certain affirmative action, set forth in the Order below, which is designed to effectuate the purposes and policies of the Act.

Amended Conclusions of Law

In Conclusion of Law 3 insert the following as paragraphs a, b, c, and d:

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[7] In its brief the General Counsel also refers to *Read's Inc.*, 205 NLRB 302, 310-311 (1973), involving a posted rule against nonemployee "solicitation or trespass for any purpose inside this store, its building, or on its property." The Board's agreement with the Administrative Law Judge that the case involved a "valid rule applied in an invalid manner" resulted from the particular circumstances: to wit, *no* contention—unlike this case—that the rule as posted was invalid.

[8] 195 NLRB 1000, 1008 (1972).

"a. Maintaining and enforcing a rule against nonemployee solicitation in the store that prohibits solicitation of off-duty employees in the Buffeteria.

"b. Maintaining and enforcing in its Buffeteria a rule against solicitation of off-duty employees by nonemployee union representatives with a purpose to discriminate against solicitation for unions as distinguished from solicitation for other organizations or projects.

"c. Engaging in surveillance of off-duty employees and nonemployee union representatives in the Buffeteria while soliciting the employees in the aforesaid manner concerning union membership.

"d. Threatening to call the police and have nonemployee union representatives removed from the Buffeteria if they refused to leave voluntarily, and summoning the police for that purpose."

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Montgomery Ward & Company, Inc., Lombard, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining and enforcing its rule against nonemployee solicitation in its department store that prohibits solicitation of off-duty employee in the Buffeteria by nonemployee union organizers who conduct themselves consistently with the purposes of the cafeteria.

(b) Maintaining and enforcing in its Buffeteria a rule against solicitation of off-duty employees by nonemployee union representatives with a purpose to discriminate against solicitation for unions as distinguished from solicitation for other organizations or projects.

(c) Engaging in surveillance of employees and nonemployee union organizers who solicit in a permissible manner as described in paragraph 1(a) of this Order.

(d) Attempting to prevent nonemployee union organizers from soliciting off-duty employees in the Buffeteria by threatening to call the police and have nonemployees removed if they refuse to leave voluntarily, and by summoning police to arrest such organizers.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Post at its Lombard, Illinois, operation copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's representatives, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

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[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

(b) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

Dated, Washington, D. C. June 22, 1981

John H. Fanning, *Chairman*

Howard Jenkins, Jr., *Member*

Don A. Zimmerman, *Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

WE WILL NOT maintain a rule against nonemployee solicitation in the store that prohibits solicitation of off-duty employees in the Buffeteria by Warehouse, Mailorder, Technical and Professional Employees, Local 743, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, or any other union, by nonemployee union organizers who conduct themselves consistently with the purposes of the cafeteria.

WE WILL NOT maintain and enforce in the Buffeteria a rule against solicitation of off-duty employees by nonemployee union representatives with a purpose to discriminate against solicitation for unions as distinguished from solicitation for other organizations or projects.

WE WILL NOT engage in surveillance of employees and nonemployee union organizers who solicit in a permissible manner in the Buffeteria. WE WILL NOT, for the purpose of preventing such solicitation, threaten to call the police and have nonemployees removed if they refuse to leave voluntarily, or summon the police for that purpose.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by the Act.

MONTGOMERY WARD & COMPANY, INC.
(Employer)

Dated_____ By_____
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Building, 219 S. Dearborn Street, Chicago, IL 60604, Telephone 312—353-7597.

JD—20—80
Lombard, IL

UNITED STATES OF AMERICA
Before the National Labor Relations Board
Division of Judges

MONTGOMERY WARD & COMPANY, INC.
and
Case No. 13—CA—17109

WAREHOUSE, MAILORDER, OFFICE, TECHNICAL, AND PROFESSIONAL EMPLOYEES, LOCAL NO. 743, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA

Ramon Martinez, Jr., Esq., and *Katherine L. Gerstenberger, Esq.*, both of Chicago, IL, for the General Counsel.
Joseph H. Hill, Esq., and *Alan Brothers, Esq.*, both of Chicago, IL, for Respondent.
Joel A. D'Alba, Esq., of Chicago, IL, for the Charging Party.

DECISION

Statement of the Case

NANCY M. SHERMAN, Administrative Law Judge: This case was heard in Chicago, Illinois, on July 31, 1978, through August 2, 1978, pursuant to a charge filed on December 7, 1977, and amended on December 22, 1977, and a complaint issued on April 13, 1978. The question presented is whether Respondent Montgomery Ward & Company, Inc., which operates a department store in a shopping mall, violated Section

8(a)(1) of the National Labor Relations Act, as amended, ("the Act") by maintaining an overly broad no-solicitation rule; demanding that agents of the Warehouse, Mailorder, Office, Technical, and Professional Employees, Local 743, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, ("the Union") refrain from soliciting Respondent's employees and leave Respondent's property or be arrested; threatening, in the presence of Respondent's employees, to cause the arrest of such union agents, and summoning police for such purpose, in order to prevent such solicitation; engaging in surveillance of union agents while they were soliciting employees in Respondent's public cafeteria during their nonworking time; and thereafter refusing to allow union agents to engage in such solicitation.

Upon the entire record, including my observation of the witnesses, and after due consideration of the excellent briefs filed by Respondent, the Union, and counsel for the General Counsel ("the General Counsel"), I hereby make the following:

Findings of Fact

I. Jurisdiction

Respondent is an Illinois corporation which sells merchandise at retail in Lombard, Illinois. During the calendar and/or fiscal year preceding the issuance of the complaint, a representative period, Respondent's gross revenues exceeded $500,000 and its Lombard facility received goods and materials valued in excess of $50,000 directly from points outside Illinois. I find that, as Respondent concedes, Respondent is engaged in commerce within the meaning of the Act, and that assertion of jurisdiction over its operations will effectuate the policies of the Act.

The Union is a labor organization within the meaning of the Act.

II. The Alleged Unfair Labor Practices

A. The Physical Setting

The Yorktown Shopping Center is located on a diamond-shaped lot at the intersection of Highland Avenue on the west, and Butterfield Road on the southeast, in Lombard, Illinois. There are no sidewalks on either side of either Highland Avenue or Butterfield Road. On the southeast side of Butterfield Road opposite the shopping center is an expressway; on the west side of Highland Avenue opposite the shopping center is a builders' development and a cemetery. Strips of public land, separated from the shopping center by a chain-link fence, bound the east side of Highland Avenue and the northwest side of Butterfield Road. These strips are 15 to 20 feet wide, are covered with grass, and are sloped for drainage purposes.[1] Highland Avenue and Butterfield Road are both four-lane highways, with speed limits of 30 miles per hour and 50 miles per hour respectively.

Ward's employee Kabat, who at the time of the hearing had worked in Respondent's store in the Yorktown Shopping Center for at least 8 months, credibly testified that she had never seen any pedestrian walking along the grassy strips separating the shopping center from Highland Avenue and Butterfield Road, had never seen anyone selling anything in such strips, and could not recall seeing anyone selling anything on the other side of either road. Ward's employee Janet Piscule, who at the time of the hearing had worked at Respondent's Yorktown store for at least 8 months, credibly testified that she had never noticed any pedestrians crossing either road. There is no evidence that any pedestrians ever crossed either road in the general area of the shopping center, that any

[1] My finding as to the Highland Avenue slope is based on the testimony of employees Geraldine Kabat and Judith Leatherman. I credit them over credit operating center manager Douglas Ruhl, for demeanor reasons and because Kabat had better reason than Ruhl to notice the slope.

pedestrians ever walked along the grassy strips in that area, or that anyone ever sold anything on either side of either road in that area. Both Kabat and Piscule credibly testified to the belief that it would be unsafe to walk in the grassy strips. No witness testified to a contrary opinion.

Two entrances lead into the shopping center, one from Butterfield Road and one from Highland Avenue. Both of these entrances have traffic lights which control the flow of traffic entering and leaving parking lots adjacent to Ward's facility in the Yorktown mall. Traffic entering at either of these entrances is routed to a 40-foot wide access road on the interior of the center's parking lots.

Most of the retail facilities in the Yorktown Shopping Center are within a completely enclosed, 2-level shopping mall which contains 4 full-line department stores (including Ward's) and about 100 specialty stores. The enclosed mall is completely surrounded by parking lots. Ward's facility is a two-story rectangular building at one end of the mall, in the portion nearest to the intersection of Highland Avenue and Butterfield Road. Ward's owns the land on which its store is located and also most of the parking-lot area between the chain-link fence and the southwest and southeast sides of its store. These parking areas are separated from the store by sidewalks on Ward's property. An ordinary visitor to the mall has no way of knowing whether he has parked in a parking area owned by Ward's.[2] The Ward-owned land totals about 17 acres.

The instant case centers around incidents in Ward's "Buffeteria." The Buffeteria is a cafeteria-type restaurant which sells only food and beverages and is located on the second floor of Ward's facility. Customers can enter the Buffeteria directly from the mall or directly from the parking-lot area owned by

[2] Ward's brief asserts that the rest of the mall parking lot is divided into sections which, although not visibly separated, are individually owned by the remaining three major "tenants" of the mall.

Ward's, but cannot enter the Buffeteria from Ward's retail-store area owing to stanchions placed by Ward's to prevent such traffic. The Buffeteria opens for breakfast during the week about an hour and 10 minutes before Ward's retail store is open for business, and closes about an hour and a half before Ward's retail store is closed.[3] The Buffeteria has a department manager and employs 10 to 14 employees, none of whom is a waiter or waitress. Its total floor area is about 3,875 square feet. It has a carpeted floor, and contains a number of tables which seat two people, are ordinarily placed together in groups of two to four, but can be readily moved. The aisles between these groups of tables are 3 or 3½ feet wide. There is no counter where customers can sit and eat. The total seating capacity is 170.

The Yorktown Buffeteria, and all similar store Buffeterias nation-wide, are operated by Ward's food service department, whose nation-wide 1977 sales exceeded $33 million, with profits exceeding $2 million. In 1977, food sales in the Yorktown Buffeteria amounted to almost $170,000, with net profits exceeding $45,000. On Friday, December 2, 1977, the date of the incident at issue in the instant case, Yorktown Buffeteria sales totaled about $650. At the Yorktown Buffeteria, Ward's periodically installs displays of merchandise for sale in the store. Also, Ward's automotive center issues coupons for free coffee at the Buffeteria to customers who are waiting for their cars to be serviced.

The Buffeteria is open to the public during all of its operating hours. Ten to twenty percent of sales in the Lombard Buffeteria are generated by Ward's own employees. With respect to Buffeteria use, such employees are treated the same as members of the public. Employees pay the same prices as

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[3] Ward's first began to operate its Yorktown Buffeteria before the rest of the Yorktown mall had been completed, and before Ward's retail store had begun operations. Ward's opened the Buffeteria operation at this early date in order to obtain trade from the construction workers who were constructing the mall.

other customers, although most Ward's departments give a discount to Ward's employees. Except during the Christmas-shopping season, the only eating room in Ward's Yorktown facility available to Ward's employees is the Buffeteria, so far as the record shows. Except for a "canteen" area which contains coin-operated food-dispensing machines, the Buffeteria is, so far as the record shows, the only place in Ward's Yorktown facility where ready-to-eat food can be purchased.[4]

In addition to space set aside for retail sales, the lower level of Respondent's Yorktown facility houses offices for a credit center. The credit center consists of two credit service centers, each of which employed about 100 employees as of August 1978, and a credit operating center, which as of August 1978 employed about 80 employees.[5] The credit operating center handles accounts receivable for 100 to 150 different facilities operated by Respondent. The two credit service centers are responsible for handling individual customer accounts.[6] Customers are directed by signs to the areas where their accounts can be discussed with Ward's representatives in the credit service centers.

Credit-center employees can and usually do use two unlabelled outside entrances, opening onto the sidewalks owned by Ward's, to enter and leave the credit center without going through the retail facility. The credit operating center is totally walled off from the retail facility. The area which houses the credit operating center and one of the two credit service centers

[4] On weekends during the Christmas-shopping season, Ward's opens a room where employees can eat "brown bag" lunches. There is no evidence that food can be purchased there. Retail employees are requested, but not required, to eat there rather than in the Buffeteria. No such requests are made to credit-center employees, the group involved here.

[5] A customer service center where customers pay their bills is not part of the credit center.

[6] Which center serves a particular account depends on the customer's address.

can be entered from the lower level of the retail facility, but with the inferential exception of the customer-conference area, access requires going through two sets of doors, which are usually if not always closed and are marked "Authorized Personnel Only."[7] There is no specific record evidence about access to the other credit service center. Inferentially, the portion of that credit service center which is not used for conferences with customers can be reached from the retail facility by means of entrances which indicate, by signs or otherwise, that the public is supposed to stay out.

B. The Union's Organizing Efforts; the Events of December 1977

In early November 1977,[8] an unidentified employee in Ward's credit operating facility telephoned the Union to obtain information about union organization. A few days later, Regina Polk, who is employed by the Union as an organizer, began an organizational campaign at the facility. Polk credibly testified that Local 743 does not organize retail employees, and that it had no desire to organize such employees or any other employees not employed in the credit center. By letter dated November 22 to Leonard Hunlock, manager of Respondent's credit operating center, the Union stated that its Office Employees' Division was conducting an organizing drive among Respondent's "Credit Operating Center" employees.

About November 28 or 29, Polk and union organizer John Garcia met with several credit-center employees after work in a

[7] Employee Leatherman, who worked in the credit operating center from September 1975 until December 1977, credibly testified that she had never seen any customers in the area. On an undisclosed date during this period, Nancy Kelly, whom Leatherman identified as a supervisor, told her nobody except employees was allowed in the part of the building behind the closed door.

[8] All dates hereafter are 1977 unless otherwise stated.

restaurant, the Golden Bear, on the perimeter of the mall area. During this meeting, the employees asked Polk and Garcia if they could make themselves available for some conversation during a lunch period. Then, Polk and Garcia arranged to meet credit-center employees Leatherman, Kabat, and Rosaline Simmons in the Buffeteria on December 2 at noon, the beginning of these employees' half-hour lunch break. The union organizers also arranged to meet other credit-center employees in the Buffeteria at 12:30 p.m., the beginning of their half-hour lunch break.

On the morning of December 2 Polk and Garcia stationed themselves on the Ward-owned sidewalk outside Ward's store and started to distribute union literature. Credit group personnel manager Reed Harvey saw them engaging in this activity, testified to having heard "through the grapevine" that they were coming to the cafeteria that lunch hour, and testified that he decided to eat lunch at the Buffeteria that day because he was expecting them.[9] Douglas Ruhl, who is operating manager of the credit operating center, testified that he and Harvey arranged early that morning to have lunch together, and that this was a normal social date.

At about noon on December 2, Polk and Garcia entered the Buffeteria. When they entered, they saw that employees Leatherman, Kabat, and Simmons had already been through the cafeteria line and were eating at two tables close together. The employees waved them over, and the union organizers went directly to an adjacent table and sat down. At this time, the cafeteria was about half full, and the other Buffeteria patrons seated nearest to the organizer-employee group were about 15 feet away. The employees told the union organizers that two members of management were there, and pointed out Harvey and Ruhl, who had ordered their food and were waiting for it in the cafeteria line.

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[9] However, he had eaten there on many previous occasions, and testified that it was possible he would have eaten there that day even if he had not expected the organizers.

After joining the employees, the union organizers chatted briefly with them. Simmons asked for a union card; Polk went through her purse and then said, "... this is really embarrassing, but I don't seem to have one." Then, Leatherman gave a card to Simmons. Harvey testified that he saw the group talking, but that he was about 10 feet away from them and could not overhear their conversation. He further testified that he approached them immediately because, that morning, he had seen these same two organizers standing on "my" sidewalk and passing out union literature.

Upon reaching the organizer-employee group, Ruhl and Harvey said that they would like to talk to the person in charge. Polk said that she would be glad to talk to them away from the employees and outside of the perimeter of the cafeteria.[10] Harvey, Ruhl, and the two organizers then left the cafeteria and went into an aisle in the retail store area, at a point near the cafeteria and within eyeshot, although not earshot, of the employees left at the table. The four exchanged their respective names and capacities. Harvey said that the organizers' being there soliciting was contrary to company policy. Harvey also said that Polk and Garcia were trespassing; that he would not permit them to talk to employees about the Union or to distribute literature in the cafeteria; that he was requesting Polk and Garcia to leave; and that if they did not leave, he would

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[10] My finding that this suggestion proceeded from Polk is based on her testimony, partly corroborated by Kabat. Polk testified that she made this proposal because she did not know the purpose of the conversation and thought that its tone might not be friendly, that being confronted by top management personnel when sitting with a union representative is a traumatic and intimidating experience for an employee, that she did not want the employees to be intimidated by being confronted by top management personnel standing over them saying that they and the union organizers had no right to be there, and that she did not want the employees to be embarrassed or put under any kind of pressure. For demeanor reasons, I do not credit Ruhl's testimony that the proposal emanated from Harvey.

call the police and have them removed. Polk said that she had no intention of leaving, that this was a public cafeteria and she was certainly part of the public, that the employees with whom she was meeting were on their own time, that they were punched out, and that they had a right to do what they wanted, including engaging in any union activity.[11] Harvey responded that if Polk and Garcia did not leave, he would call the police. Polk said that she felt strongly that he was violating the employees' rights and that he had better be very sure of what he was doing. She suggested that before doing anything, he had better call company vice president Schiedt, who is head of Ward's labor relations. Harvey said that he had already done that, and that it was at Schiedt's direct direction that Polk and Garcia should be removed by the police if necessary. Polk said "so be it" and to do what he had to do. During this conversation, Harvey did not ask why Polk and Garcia were in the Buffeteria.[12] Nor did Polk indicate that she had arranged in advance to meet with certain employees that day; however, Ruhl and Harvey had seen the organizers from the time they entered the Buffeteria and, as previously noted, the seated employees had waved them over to their table.

At the end of this conversation, Harvey and Ruhl cancelled their food orders. Harvey went to telephone the local police from a company telephone in the Buffeteria, and Polk and Garcia returned to the tables where the employees were sitting.

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[11] My findings in this sentence are based on Polk's and Harvey's testimony. For demeanor reasons and in view of the probabilities of the situation, I do not accept Ruhl's testimony that Polk said she was not in violation of Respondent's policy.

[12] This finding is based on Polk's testimony, which is indirectly corroborated by Harvey's testimony that he "assumed" they were there for union solicitation and by Ruhl's testimony that he so inferred from their prior literature distribution and their failure to buy food before sitting down. For demeanor reasons, I do not accept Ruhl's testimony, to some extent corroborated by Harvey, that Harvey asked the organizers why they were there.

The employees asked what the conversation had been. Polk said that she and Garcia were likely going to have problems meeting the employees in the cafeteria, would have to make other arrangements, and would talk to the employees about that later. Polk asked the employees to tell the other employees whom Polk and Garcia had intended to meet that a meeting was not a good idea, that Polk and Garcia were going to have problems, that Ruhl and Harvey had told the organizers to leave and were going to call the police, and that Polk did not want any employees to be embarrassed. Then, Polk and Garcia went through the cafeteria line, purchased some food, returned to the table which they had occupied before, and began to eat. After they had reseated themselves, two uniformed policemen arrived. While standing at a point in the Buffeteria apart from the union organizers' table, Harvey and Ruhl began to tell the police about this situation and why management felt the union organizers were in violation of company policies. During this conversation, employees Leatherman, Kabat, and Simmons finished their lunch and left the Buffeteria.

On the way back from lunch, these three employees encountered six employees who had arranged to meet with the union organizers at 12:30 p.m. in the Buffeteria. Kabat or Leatherman told them that police officers and Ward's officials were in the Buffeteria, and that the employees should not join Polk but should sit at another table. The six employees then proceeded to the Buffeteria, where they saw management talking to the police and the union organizers sitting at their table with their food. Polk waved them away, and they sat down about 8 feet from her.

After conversing for about 10 minutes, Harvey, Ruhl, and the two police officers came over to the union organizers and, possibly excepting one policeman, sat down. Harvey said that he had decided that the organizers would be allowed to finish their lunch, but that if they stayed any longer or solicited any employees while the organizers were eating he would have

them removed. The organizers said that they would leave after finishing their lunch. Harvey said that he and Ruhl would be sitting there to make sure that the organizers did not talk to any employees; that if they persisted in speaking to employees in the cafeteria area, he would have a complaint issued against the organizers; and that if they did not leave, he would have them removed and have a complaint issued against them. One of the policemen, a lieutenant, told the organizers that the land on which the parking lot was located, the sidewalks, and the cafeteria were all Respondent's property, that Respondent had a right to have the organizers removed, that if Respondent decided to swear out a complaint against the organizers the police would have to arrest them for trespassing, and that they should keep a $100 bond available.[13] Polk said that Federal labor law guarantees the employees the right to organize, and that this means that a union must have access to the employees. Harvey said that he had no intention of allowing the organizers on the property, either in the cafeteria, in the parking lot, or on the sidewalk, and that if the organizers persisted, he would have them arrested for trespassing. The police asked the organizers for their names and addresses, and for identification; and then left. The policemen had been at the table for 15 or 20 minutes. Harvey and Ruhl remained sitting at the table next to the organizers while they finished their lunch.[14] When the organizers got up about 10 minutes later to leave, they were escorted out through the retail store by Harvey, Ruhl, and someone who appeared to be a plainclothes security policeman. The six employees who had originally arranged to meet with

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[13] The parties stipulated that preemption considerations aside, upon Respondent's revocation of its invitation to Polk and Garcia they had become trespassers under Illinois law. See *May Department Stores Co.* v. *Teamsters Union Local 743*, 64 Ill.2d 153, 355 N.E.2d 7 (1976).

[14] This finding is based on Polk's and employee Linda Sandford's testimony. For demeanor reasons, I do not accept the testimony of Harvey and Ruhl that they kept an eye on the organizers from a point about 30 feet away.

the union organizers in the Buffeteria at 12:30 p.m. were sitting at their table throughout the entire conversation between the organizers, the police, Harvey and Ruhl, but could not overhear much of what was said. At this time, the cafeteria was still about half full.[15]

That day, the only employees to whom the organizers spoke were the three whom they met at noon. The organizers did not speak or attempt to speak to any of the retail store employees or the cafeteria employees, and did not move around between tables in the cafeteria. Nor did the organizers distribute any literature in the Buffeteria. Polk and Garcia wore no insignia which would identify them as union agents. Nor do any of Respondent's credit-center employees wear uniforms or nameplates which would advise third persons that they are employed by Respondent.

C. The Union's Subsequent Organizational Efforts; Alleged Alternative Means of Communication

By letter to credit operating center manager Hunlock dated December 9, a week after the Buffeteria incident, the Union referred to its campaign to organize Respondent's "Credit Center," and stated:

> We feel strongly that your denial of our rights to make contact with employees 1) by distribution of literature before working hours, and 2) on employees' lunch breaks in your public cafeteria, is contrary to [the Act].
>
> Therefore, we . . . request that you allow us to engage in the above mentioned activities with the provision that no such activity interfere with the business operation of the company.

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[15] My findings as to the sequence of the events after management's conversation with the union organizers outside the Buffeteria and until the police left are based on the testimony of Ruhl, Harvey, Leatherman, Kabat, and Piscule, and inferences therefrom. I believe Polk was mistaken as to the order in which some of these events occurred.

The letter went on to say that if Respondent did not "agree to give us access to your property do distribute literature and talk to employees," the Union was requesting a list of names and addresses of all eligible employees in the "credit operating center." The letter alleged that such a list was necessary to allow the Union to communicate with all of Respondent's employees "so that they may exercise their rights to join or suppor the Union of their choice."

By letter to the Union dated December 15, Hunlock stated that Respondent would respect its employees' right to join or not join a union, and expressed doubt that the employees at the "credit center" wanted a union. Respondent rejected, on the ground of the employees' right to privacy, the Union's request for the employees' names and addresses. Further, the letter stated:

> The company has the legal right to prevent non employees from distributing literature on its own property if reasonable efforts by the union through other available channels of communication will enable it to reach the employees with its message.... The company does not have an obligation to provide non employee union organizers access to our employees on company property when there are reasonable alternatives to your union.
>
> We feel that attempts by non employee organizers to distribute literature in the cafeteria is a potentially disruptive activity. It not only hinders the orderliness of our employees eating their lunches but it potentially could disrupt the activities of our customers and subject them to union arguments that may be somewhat offensive to our customers.
>
> In view of these facts and the desire of the company to maintain discipline and order throughout our facility, the company respectfully denies your request to use company property for personal reasons.

Polk testified that the Union was interested in organizing all employees who worked in the credit operating center, but that until the August 1978 hearing she was not aware that there was

a credit service center. (As previously noted, there are in fact two credit service centers.) Later, union counsel stated that the Union had not previously known of "the specific relationship between the three credit centers," and that the Union was interested in representing all the employees who worked on credit matters, whether in the operating center or in the service center.

Respondent's retail store is open for business from 9:30 a.m. to 9:30 p.m., including Saturdays. The mall closes at 9:30 or 10 p.m.[16] About 98 percent of Respondent's full-time credit operating employees arrive at the facility between 6:15 and 8:30 a.m. and leave between 2:45 and 5 p.m. The vast majority of these full-time employees work from 8:30 a.m. to 5 p.m. Most of Respondent's retail store employees leave after 6 p.m. Part-time credit operating employees, perhaps 20 in number, work a varying number of hours within varying time spans, usually beginning after full-time credit operating employees start work and in some cases after full-timers leave for the day. Most, but not all, full-time credit operating employees do not work on Saturdays. The only persons who have occasion to come to the mall as early as 6:15 a.m. are credit operating employees employed by Respondent, except that Respondent's shipping and receiving employees work a night shift whose hours Ruhl did not know and are not shown by the record. The Union was advised as to about when Respondent's credit operating center employees began to come in and when the last group came in, but not when the bulk of them came in. Further, the Union was advised that some of the credit operating center employees work on Saturdays. Leatherman's testimony suggests that the credit operating employees and the credit service employees work the same hours, but she had limited opportunity to observe and the record in this connection is unclear. All full-time credit-center employees have a half-hour unpaid lunch period, which usually begins at noon or 12:30 p.m., and two 15-minute paid breaks a day.

[16] The record fails to show whether it is open on Sundays.

Although there is a bus stop near or on the Yorktown mall, about 95 percent of the credit-center employees drive to work. They use cars which bear no indication that the drivers or passengers work for Respondent. The record fails to show the extent, if any, of carpooling between credit-center employees, between them and other personnel of Respondent, or between them and persons who work in or around the mall and are not employed by Respondent. Respondent has issued instructions to its employees—including credit-center employees, Buffeteria employees, and retail employees—to park only in certain portions of the parking lot which serves the entire mall area. These areas are frequently if not always indicated by markers whose significance is supposed to be understood by employees, but such markers would not tell a nonemployee which spaces are supposed to be used by employees. Moreover, employees sometimes park in spaces where they are not supposed to park.[17] Furthermore, customers can and do park in the areas which employees are supposed to use. Also, Respondent makes no effort to prevent employees of other stores in the mall from parking in the areas where Respondent's employees are supposed to park. After December 2, the Union was told that most of the credit operating center employees parked in a designated area of the parking lot. The record fails to show whether the Union was told what these portions were.

In November 1977, these areas consisted of two areas which were mostly if not entirely on land owned by the Yorktown mall itself. These areas were adjacent to Butterfield Road and Highland Avenue, respectively. In the former area,

[17] Partly because of periodic changes in the areas which employees are supposed to use, the testimony of credit-center employee Kabat indicates that she was confused about which parking spaces she was supposed to use. Credit-center employee Leatherman credibly testified that for reasons related to personal safety, when reporting to work at 6:30 a.m. she frequently parked in an area supposed to be used by customers only. Credit-center employee Piscule credibly testified that she sometimes parks in such an area because it is "closer."

first-row cars were parked with their bumpers facing Butterfield Road, but the others were parked diagonally. I credit the testimony of employees Kabat and Piscule and discredit the testimony of Ruhl in this connection, and conclude that persons who stationed themselves on the publicly owned grassy strip between Butterfield Road and the parking lot fence would be able to see the license plate numbers on the first row of cars only. Ruhl testified without contradiction that car license plate numbers could be observed in the parking area adjacent to Highland Avenue by a person on the grassy strip between that street and the parking-lot fence. There is no record evidence about whether the Yorktown mall permitted union representatives to enter its own parking lots in order to obtain the license numbers on cars. In December 1977, the employees were instructed to stop using much of the latter parking area, including the part nearest to Highland Avenue, and to use instead an area much of which is owned by Respondent and is about 400 feet from the nearest public road and from areas not owned by Respondent. Cars in this newly added area were parked facing each other, and at a slant, on either side of parallel lines drawn on the pavement without reference to the distance from Highland Avenue. As to this newly added area, I credit the testimony of employees Kabat and Piscule and discredit the testimony of Ruhl in this connection, and conclude that persons could not see the numbers of any of the license plates on cars parked in this area without entering land owned by Respondent.

During December 1977, the mean temperature in the area was 24.2 degrees Fahrenheit, a temperature somewhat lower than the December normal in the area. Also, during November 1977, December 1977, and January 1978, an unusual amount of snow fell in the area.[18] During these months, 2 or 3 feet of

[18] My findings in these two sentences are based on certain climatological data, prepared by the United States Department of Commerce, which are attached to the General Counsel's and

Footnote continued on following page.

snow accumulated on the publicly owned grassy strips next to the shopping center, because the adjacent public roads and the intersecting egress roads into the shopping center were snowplowed.[19]

After December 2, the Union took some license numbers off some cars that it thought were perhaps registered to Respondent's credit center employees, obtained addresses listed for those license numbers, and mailed union literature to such addresses. The Union received no authorization cards or telephone calls in response to this mailing. None of the employees ever supplied the Union with the names and addresses of other credit operating center employees. Polk testified that she received "very vague information" from credit operating center employees concerning individuals and what department they worked in, and that "Some employees . . . in some departments are apparently very much confined and don't

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Footnote continued from preceding page.

the Union's briefs. Respondent having filed no objection to opposing counsel's request that I take judicial notice of this material, the request is hereby granted. This material shows that at the Chicago Midway Airport, about 25 miles from Lombard, the mean December temperature between 1958 and 1977 was 26.8, and the mean December temperature between 1938 and 1977 was 29.3. This material further shows that in the same location, 6.3 inches of snow fell in November 1977, 19.2 inches fell in December 1977, and 32.3 inches fell in January 1978. Between 1938 and 1977, the mean November snowfall was 2.9 inches, the mean December snowfall was 10.8 inches, and the mean January snowfall was 9.9 inches.

[19] The shopping-center parking areas were also cleared by snowplows, which left piles of snow 2 or 3 feet high inside the fence along Butterfield Road, in the new employee parking area, and around the light posts. The snow raised both the eye level of a person who chose to stand on the grassy strips and the eye level necessary to read license plates on cars parked in the shopping center.

have information in other areas."[20] Leatherman, who worked in the credit center for about 2 years, credibly testified that she did not know all of the employees in the credit operating center by name; knew the "biggest majority," but not all, by face; and did not know which municipalities most of them lived in. Sometime in December, Polk read to a group of 10 or 11 employees a list of 75 to 85 names which, Polk said, she had obtained from the parking lot license plates.[21] Piscule recognized three or four, at least one of whom was a retail clerk. Collectively, the group recognized no more than five names. Piscule never provided the Union with the names, addresses, or telephone numbers of her fellow employees.

The employees in the credit center have one-half hour for lunch. The mall contains about four cafeterias in addition to the Buffeteria, and several restaurants where patrons are served at a table. The eating facility most distant from the credit center, Penney's cafeteria, requires a 10-minute walk each way.[22] Leatherman credibly testified that she ate lunch in the Buffeteria more often than anywhere else, and that she ate lunch at the Harvest House cafeteria and at Walgreen's[23] only once or twice because they were so crowded. In view of her testimony in this respect, employee Sandford's testimony that the Buffeteria is a 2 or 3 minute walk from the credit center, and Ruhl's testimony that he frequently ate lunch and usually ate afternoon snacks there, I infer that the Buffeteria was the public

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[20] One of the two credit service centers is adjacent to the credit operating center; the other credit service center is on the opposite side of the building. As previously noted, until the hearing Polk was unaware of the existence of any credit service center.

[21] There is no evidence, other than hearsay evidence, that she in fact obtained the names in this manner.

[22] Leatherman credibly testified that she ate there only when she was given a longer lunch break, because "it takes so long to walk there."

[23] Ruhl testified that this is not a cafeteria. Sandford testified otherwise.

dining facility which enabled the credit-center employees to spend the most time discussing the Union while eating lunch during their lunch break, taking into account the distance and crowds between the credit center and other eating facilities, the crowds within those facilities, and the time saved by a cafeteria format in obtaining a table. However, Piscule's testimony that she has in fact eaten lunch at four restaurants (other than the Buffeteria) in the mall and on occasion outside the mall, and Ruhl's testimony about the principal location of other eating establishments on the mall and that he normally takes his morning snack at Walgreen's "since it's quicker to get in and out," lead me to conclude that the union organizers could have discussed the Union during the credit-center employees' lunch at one of these other establishments, at least if they do not have the same solicitation ban as Respondent alleges that it has.[24] In fact, Polk testified that she could have used some of the other public cafeterias in the mall to meet Respondent's employees. Moreover, Polk did conduct two meetings after work in a public restaurant called the Golden Bear, which she believed to be owned by Respondent, on the perimeter of the mall area; another meeting at one of two restaurants next to the Golden Bear; and yet another meeting at a restaurant in Oak Brook. More than three-fourths of the credit-center employees are women. The record fails to show how many of them have family responsibilities.

On at least two occasions between December 2, 1977, and the end of July 1978, the Union attempted to distribute literature on Respondent's sidewalks next to its store. On two occasions the police were called, and on one occasion, about early May 1978, the union president was arrested.

As of about October 1978, Respondent's credit operating center and credit service centers employed about 222 full-time employees who lived in 45 different communities. Thirty-three

[24] Harvey testified, in effect, that he would have stopped the union organizers if they had solicited employees not employed by Respondent.

of these communities housed five or fewer employees each; nine of these communities housed six to twenty employees each; and the remaining three communities housed twenty-one to thirty-four employees each. The most distant of these communities (Midlothian, which housed one employee) is about 37 miles from Lombard. About 137 of these employees—that is, about 61 percent—live within a 10-mile radius of Lombard.[25] About 163—that is, about 73 percent—live within a 15-mile radius.[26]

Practically all the communities where these employees live are located in the metropolitan area of Chicago, which has two major newspapers and a number of radio and television stations. The single community housing the largest number of these employees (34, or about 15 percent) is Lombard, which has a local newspaper. Bowlingbrook and Romeoville, with a total of two credit-center employees, have a semiweekly newspaper. So far as the record shows, the Union never tried to further its organizational campaign by advertisements in newspapers, on the radio, or on television.

D. Respondent's No-Solicitation Rule

The parties stipulated that the following rule was in effect at all relevant times:

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[25] These communities are Addison (11 employees), Bellwood (2), Bloomingdale (1), Carol Stream (5), Clarendon Hills (2), Downers Grove (14), Elmhurst (7), Glendale Heights (1), Glen Ellyn (18), Hinsdale (1), Lisle (9), Lombard (34), Oakbrook (1), Villa Park (21), Westchester (2), and Wheaton (8).

[26] In addition to those listed *supra* fn. 25, these communities are Brookfield (1), Darien (4), LaGrange (1), Maywood (1), Melrose Park (1), Naperville (6), West Riverside (2), and Woodridge (10).

DISTRIBUTION OF LITERATURE AND SOLICITATION ON COMPANY TIME FOR NON-COMPANY ACTIVITIES

Employees may not distribute union literature or solicit membership in unions, or fraternal, religious, social, or political organizations on Company time, or while employees to whom literature is being distributed, or whose membership is being solicited, are on Company time. Company time is that time which the employee is scheduled to be on duty and for which the employee is being paid, excluding rest periods, lunch periods, and time before and after the employee's working day.

Solicitation by employees is permitted on Company property so long as the employees, both those soliciting and those being solicited, are on their own time and the solicitation is conducted in a quiet and orderly manner and does not interfere with the operation of the Company's business. Meetings or speeches are not to be permitted; solicitation which results in disturbing or interfering with the work or function of any of the employees or department is forbidden; solicitation which is detrimental to maintaining the premises in a clean and attractive condition is forbidden.

Solicitation by non-employees of the Company is prohibited at all times in the store and store operated buildings.

It is a violation of the Company's No Solicitation rule either to solicit or be solicited in a manner prohibited by this rule.

Solicitations for charity drives and fund raising compaigns are to follow the guidelines for solicitation as outlined above. The Company generally supports one all-out community charity drive. Prior approval is required for any additional charity drive held on Company property. There are times when expressions of Friendship or goodwill for co-workers are permissible, but in order to protect employees from too frequent collections for such purposes written permission for such solicitation must be obtained from the store manager or personnel manager.

> Any violations of the Company No Solicitation rule should be reported at once to your immediate supervisor or a store staff member.

The rule is not given to employees when they are hired. The record fails to show when and where, if ever, it was posted.[27] Employee Sandford, who began working at the Yorktown facility in October 1975, credibly testified that she never saw this rule before meeting with Polk in the cafeteria on December 2, 1977; that she first saw the rule a few days after the meeting; and that before seeing this rule she had never been told that Respondent had any solicitation or distribution rules in effect.

E. Analysis and Conclusions

1. Whether the no-solicitation bar was intended to discriminate against union solicitation

The General Counsel and the Union contend that Respondent's bar against solicitation by nonemployees was intended to discriminate against union solicitation. Respondent's brief denies that the bar had such a purpose, and further states that "one" purpose of the bar "is to prevent the disruption, or the threat of disruption, of the selling function of Respondent's retail store and to avoid customer confusion and interference which would, or could, be caused by solicitations within the Lombard facility."[28] Some of the evidence lends support to Respondent's contention regarding the bar's purpose in connection with the Buffeteria. Thus, upon being asked for the

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[27] Early during the first day of the hearing, the parties stipulated that the rule had been posted at all relevant times. A few minutes later, the General Counsel moved for leave to withdraw from the stipulation, on the ground that during a recess she had obtained evidence that it was not posted until after the Buffeteria incident. Union counsel stated that he had no objection to the motion. Upon the concession of Respondent's counsel that he would suffer no prejudice if the motion were granted, I granted the motion over his objection.

[28] Respondent's brief does not set forth other purposes of the bar.

second time to give the purpose of the rule, personnel manager Harvey testified, "The purpose of the rule is to prevent any type of disruption of activities in terms of normal functions in terms of our normal business operations."[29] Further, Harvey testified that the rule would lead him to prohibit a representative of the American Cancer Society from soliciting contributions from persons in the Buffeteria, either orally or by displaying a sign on his lunch table. In addition, Harvey testified that the rule would lead him to prohibit representatives of charity groups from discussing a charity drive with employees in the Buffeteria. Moreover, operations manager Wall testified that the purpose of enforcing the no-solicitation rule in the whole store, including the Buffeteria, is that "We just don't want the interruption of the customers, the inconvenience of the customers." Further, he credibly testified that about February 1977, Respondent told an "outfit" to leave the store because it was "bothering" employees in the store by "trying to sell [them] some stuff." Also, he testified that Respondent needs turnover in the Buffeteria, and cannot afford to have people filling chairs "all the time" in the Buffeteria when they do not need to be seated in order to eat the food they bought there.

However, other evidence in the record is difficult, if indeed not impossible, to reconcile with any contention that as to the Buffeteria the bar's only purposes are to avoid disturbance of customers and to insure turnover by paying customers. Moreover, much of such evidence indicates that Respondent administered this bar in the Buffeteria for a purpose of preventing the subject of union organization from being discussed between nonemployees and employees, and that Respondent would not attempt to bar nonemployee "solicitation" of employees, in the manner which the union representatives adopted here, so long as unionization was not the subject matter of the "solicitation."

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[29] Harvey's initial response to this question is discussed *infra.*

Thus, at least where (as here) restaurant patrons would have no way of knowing whether the parties to solicitation conferences are employees of Respondent, whether they are such employees could not affect any impact of such solicitation upon patrons.[30] Respondent's written no-solicitation rule implicitly recognizes this by imposing a blanket prohibition on all solicitation by nonemployees, without limitation based on the status of those solicited. However, the record indicates that Respondent interprets its solicitation ban so as to forbid certain nonemployee solicitation of employees but not nonemployees. Thus, when asked the purpose of the no-solicitation rule, personnel manager Harvey initially testified, "The purpose . . . is to prevent any type of solicitations of *employees* by nonemployees on company property and time" (emphasis supplied). Moreover, Harvey testified that the no-solicitation rule did not call for the expulsion from the Buffeteria of a nonemployee who, while eating with a nonemployee friend, tried to induce him to join the American Bar Association; but that the rule would call for such expulsion if the inducement was directed at an off-duty employee who had just finished law school. Furthermore, Harvey's testimony indicates that the scope of the ban on solicitation of employees depends partly on the kind of organization being solicited for; thus, he testified, in effect, that he was unsure whether he would have taken any action if the December 2 solicitation by nonemployees had been directed toward the formation of a Girl Scout troop by employees. Indeed, when asked about whether the no-solicitation rule would be violated by a nonemployee who

[30] In connection with the Buffeteria incident, Respondent abandoned an attempt to show that the employees did not have coats with them. Indeed, persons who worked in other mall establishments might well have regarded coats as unnecessary for a walk along an enclosed mall into the Buffeteria. In any event, I doubt that other Buffeteria patrons would have noticed the absence of coats, or if they did, would have troubled to ponder its significance.

asked an off-duty employee to join the American Bar Association, Harvey initially replied that his decision would hinge on "what that solicitation involved."

That Respondent discriminatorily administered the ban for an antiunion purpose is further shown by Harvey's testimony that upon seeing the union representatives in the Buffeteria he immediately "assumed they were there *for union solicitation*," that "their being there soliciting employees *for union membership* was the issue," and that "their being there soliciting *for union membership* was contrary to company policy. That is why I did what I did" (emphasis supplied). Additional evidence of the rule's discriminatory purpose is Harvey's testimony that if he saw a group of people in the Buffeteria talking, he would not approach them to find out what they were talking about, that he had never approached a nonemployee in the Buffeteria to find out what he was talking about, and that he approached Polk and Garcia in the Buffeteria without knowing what they had been saying to the employees whom they had joined and because he recognized them as union organizers. Discriminatory intent is further indicated by the testimony of Ruhl, who approached the union organizers in the Buffeteria because he had seen them earlier that day passing out union literature on a Ward-owned sidewalk next to the store, that Respondent's written no-solicitation rule forbids nonemployees to distribute literature on Ward-owned sidewalks and parking lots. That rule, which he read before so testifying, merely forbids nonemployees to solicit "in the store and store operated buildings." Further suggestive of a discriminatory intent is credit operating center manager Hunlock's December 15 response to the Union's December 9 request for access to certain portions of Respondent's property. Hunlock rejected this request *in toto* on the ground that distribution of literature in the Buffeteria is a "potentially disruptive activity" which, *inter alia* "hinders the orderliness of our employees eating their lunches," even though the Union's letter did not request permission to distribute

literature in the Buffeteria and Harvey testified that he had not seen the union representatives distribute literature there. Also suggestive of discriminatory application is Respondent's toleration of the conduct of employee Simmons, one of the employees who were present during the first part of the Buffeteria incident, in using working time to solicit other credit-center employees to buy jewelry and cosmetics from a catalog-order firm other than Ward's, even though this activity occurred under circumstances where supervisor Lorraine Francischini and other credit-center supervisors must have been alerted thereto, Respondent's written rule forbids employees to solicit during working time for any purpose, and Ward's itself also sells jewelry and cosmetics.[31]

Furthermore, by stating on the record that Respondent would have barred the union representatives from coming into the premises to buy food and, while eating, to solicit the employees, Respondent's counsel in effect admitted that Respondent's exclusion of the union representatives from the half-empty Buffeteria was not motivated by a desire to insure paying-customer turnover.[32] Indeed, operations manager Wall's testimony at one point (transcript page 43, lines 19-22) that employees are not informed that they should get out of the cafeteria so other people can come in,[33] and the absence of any

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[31] Personnel manager Harvey credibly testified that he was unaware of this activity, and there is no evidence that Wall and Ruhl knew about it. However, see *Westinghouse Electric Corp.*, 240 NLRB No. 129 (ALJD p. 22, Part II C1) (1979), mod. 103 LRRM 2171 (C.A. 8, 1979).

[32] Polk credibly testified that when the union representatives entered the Buffeteria, they had already decided to eat lunch there. There is no evidence that Harvey and Ruhl knew this when first approaching the union representatives, who were then seated at a table without having bought any food. Nor is there any evidence that Harvey or Ruhl asked whether the union representatives planned to buy food, or referred at all to the fact that they were not then paying customers.

[33] This testimony is consistent with that of Leatherman, who often ate lunch there.

posted notice forbidding employees to eat brown-bag lunches in the Buffeteria without buying anything there,[34] indicate that Respondent is not particularly concerned by problems relating to Buffeteria turnover and the use of Buffeteria chairs and tables by persons who have not bought any food there.

In view of the foregoing considerations, I conclude that a purpose of Respondent's rule against solicitation by non-employees was to discriminate against "solicitation" of non-Buffeteria employees by union organizers where, as here, such "solicitation" was part of an orderly, discreet conversation by appointment with willing employee patrons over tables where they were eating during their unpaid lunch periods. Because of this discriminatory purpose, Respondent's maintenance and enforcement of this rule to this extent violated Section 8(a)(1) assuming *arguendo* that a nondiscriminatory restriction of Buffeteria solicitation under such circumstances would be permitted by *N.L.R.B.* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956) and related cases. *Babcock, supra,* 351 U.S. at 112.

The foregoing evidence further shows that Respondent did not in fact administer its no-solicitation rule so as to bar nonemployee patrons from attempting to discuss with other patrons (employees and otherwise) the merits of joining organizations other than unions, where such discussions were conducted in the Buffeteria in a manner externally indistinguishable from other conversations normally incident to a meal. Nor would it be practicable for Respondent to enforce such a limitation in a cafeteria where the public are invited to eat, and where patrons would normally expect to engage while eating in social conversations which would sometimes include nonunion "solicitation" activity. So long as the patrons externally conduct themselves as Polk and Garcia did here, the only ways

[34] The record fails to show whether Respondent has any written rule to this effect. However, from time to time management approaches such employees in the Buffeteria and requests them not to engage in this practice.

that Respondent could effectively police restrictions on conversations about the merits of any organizational activity (union or otherwise) would be to systematically eavesdrop on all Buffeteria conversations including nonemployees, who generate 80 or 90 percent of Buffeteria sales, or to ask one of the patrons participating in each conversation involving a nonemployee whether any nonemployee was then asking anyone to join anything. I do not believe that Respondent would engage in any conduct so time-consuming and so potentially annoying, if indeed not infuriating, to customers.[38] Thus, aside from the Polk-Garcia incident, there is no evidence whatever that Respondent ever made any effort even to find out whether seemingly ordinary social conversations including nonemployee Buffeteria patrons involved requests to join any organization, let alone that Respondent threatened any nonemployees with expulsion from the Buffeteria for engaging in such "solicitation." Indeed, there is no evidence that Respondent's no-solicitation rule is posted where even employees, let alone nonemployee Buffeteria patrons, can see it.

In short, the General Counsel and the Union tender an essentially theoretical question when they urge that Respondent could not lawfully enforce even a nondiscriminatory no-solicitation rule to the extent of forbidding union organizers to meet with off-duty employees in the Buffeteria to discuss the Union, so long as they conduct themselves consistently with the purposes of the cafeteria. In view of the academic nature of the parties' dispute about the legality of such a nondiscriminatory ban, I need not and do not determine whether the legality of such a restriction would depend on the *Babcock* standard of whether "reasonable efforts by the union through other available channels of communication will enable it to reach the

[38] In fact, operations manager Wall testified that Respondent was unable to prevent its own retail employees from using the Buffeteria during the Christmas-shopping season.

employees with its message" (351 U.S. at 112).[36] Accordingly, neither do I determine whether that standard has been satisfied here. However, because after receiving this Decision the parties may wish to address before reviewing bodies the propriety of such a nondiscriminatory rule, evidence allegedly material to that standard has been summarized herein.

2. Other issues presented by the pleadings

I have found that Respondent violated Section 8(a)(1) by discriminatorily maintaining and enforcing in its Buffeteria a ban against nonemployees' union solicitation of employees during nonworking time in the manner adopted by union representatives Polk and Garcia. Accordingly, Respondent further violated Section 8(a)(1) by engaging in surveillance of these union representatives while they were engaging in such solicitation. *W. T. Grant Co.*, 195 NLRB 1000, 1008 (1972). Further, I agree with the General Counsel that Respondent also violated the Act by threatening to call the police and have these union representatives removed if they refused to leave voluntarily; and by summoning the police for that purpose. *Scott Hudgens*, 192 NLRB 671 (1971), 205 NLRB 629 (1973);[37] *Payless*, 162 NLRB 872 (1967). Although much of the conversation during these events was inaudible to employees, I am persuaded that what they could see and hear enabled them to infer what Respondent was doing.

Conclusions of Law

1. Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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[36] Cf. *Meier and Frank Co.*, 198 NLRB 491 (1972); *Reads Inc.*, 205 NLRB 302, 310-311, 313-314 (1973); *Oertle Management Co., Inc.*, 182 NLRB 722 (1970).

[37] Enfd. 501 F.2d 161 (C.A. 5, 1974); reversed with instructions to remand to the Board, 424 U.S. 507 (1976); initial decision adhered to on remand, 230 NLRB 414 (1977).

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) of the Act by the following conduct:

a. Maintaining and enforcing in its Buffeteria a rule against union solicitation of employees by nonemployees, with a purpose to discriminate against solicitation for unions in a particular manner as compared to solicitation for other organizations in the same manner.

b. Engaging in surveillance of nonemployee union representatives in the Buffeteria while they were soliciting employees in the aforesaid manner to join the Union.

c. Under circumstances where employees could from their own observation infer what was happening, threatening to call the police and have these union representatives removed from the Buffeteria if they refused to leave voluntarily, and summoning the police for that purpose.

4. The foregoing unfair labor practices affect commerce within the meaning of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be required to cease and desist therefrom and from like or related conduct. Affirmatively, Respondent will be required to amend its no-solicitation rule so as to permit nonemployee solicitation in the Buffeteria on behalf of unions in the same manner that Respondent in fact permits nonemployee solicitation in the Buffeteria on behalf of other organizations. In order to forestall the possibly coercive exposure of employees to employer efforts to expel representatives of Local 743 and other unions from the Buffeteria, Respondent will also be required to post, at locations

where nonemployee organizers and employee patrons are likely to see it before entering the Buffeteria, any no-solicitation rule applicable to nonemployees in the Buffeteria. In addition, Respondent will be required to post appropriate notices for inspection by employees.

Upon the foregoing findings of fact and conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended Order:[38]

ORDER

Respondent Montgomery Ward & Co., Inc., its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Maintaining and enforcing a rule forbidding nonemployees to solicit employees in Respondent's Lombard, Illinois, Buffeteria on behalf of Warehouse, Mailorder, Office, Technical, and Professional Employees, Local 743, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, or any other labor organization, in a manner which Respondent would permit if the solicitation were on behalf of organizations other than labor organizations.

(b) Engaging in surveillance over nonemployees while they engage in the kind of solicitation which must be permitted under paragraph 1(a) of this Order.

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[38] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(c) For the purpose of preventing the kind of solicitation which must be permitted under paragraph 1(a) of this Order, threatening to call the police and have nonemployees removed if they refuse to leave voluntarily, and summoning police for that purpose, under circumstances where employees can from their own observation infer what is happening.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Amend its non-solicitation rule so as to permit nonemployee solicitation in the Lombard, Illinois, Buffeteria on behalf of labor organizations in the same manner that Respondent in fact permits nonemployee solicitation in the Buffeteria on behalf of other organizations.

(b) Post the no-solicitation rule applicable to nonemployees in the Lombard, Illinois, Buffeteria at locations where nonemployee organizers and employee patrons are likely to see it before entering the Buffeteria.

(c) Post at its Lombard, Illinois, operation copies of the attached notice marked "Appendix."[39] Copies of said notice, on forms provided by the Regional Director for Region 13, after being signed by Respondent's representatives, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Rea-

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[39] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

sonable steps shall be taken by Respondent to ensure that such notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 13, in writing, within 20 days of the date of this Order what steps Respondent has taken to comply herewith.

Dated, Washington, D.C. January 25, 1980

NANCY M. SHERMAN

Nancy M. Sherman
Administrative Law Judge

APPENDIX

ID—20—80

FORM NLRB—4727
(9-68)

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

AFTER A HEARING IN WHICH ALL PARTIES HAD THE CHANCE TO PRESENT THEIR EVIDENCE, IT HAS BEEN DECIDED THAT WE VIOLATED THE LAW IN CERTAIN WAYS. WE HAVE BEEN ORDERED TO POST THIS NOTICE. WE INTEND TO CARRY OUT THE ORDER OF THE BOARD AND ABIDE BY THE FOLLOWING:

WE WILL NOT maintain or enforce a rule forbidding nonemployees to solicit employees in our Buffeteria on behalf of WAREHOUSE, MAILORDER, TECHNICAL AND PROFESSIONAL EMPLOYEES, LOCAL 743, AFFILIATED WITH THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, or any other union, in a manner which we would permit if the solicitation were on behalf of organizations other than unions.

WE WILL NOT engage in surveillance over nonemployees while they engage in the kind of union solicitation which is permitted under the paragraph above. WE WILL NOT, for the purpose of preventing that kind of solicitation, threaten to call the police and have nonemployees removed if they refuse to leave voluntarily, or

summon the police for that purpose, under circumstances where you can infer from your own observation what is happening.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights under the Act.

WE WILL amend our no-solicitation rule so as to permit solicitation by nonemployees in the Buffeteria on behalf of unions in the same manner that we in fact permit solicitation by nonemployees in the Buffeteria on behalf of other organizations.

MONTGOMERY WARD & COMPANY, INC.

(Employer)

Dated_____ By_____

(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Everett McKinley Dirksen Bldg., 219 S. Dearborn St., Chicago, IL 60604, Telephone (312) 353-7597.

DISTRIBUTION OF LITERATURE AND SOLICITATION ON COMPANY TIME FOR NON-COMPANY ACTIVITIES

Employees may not distribute union literature or solicit membership in unions, or fraternal, religious, social, or political organizations on Company time, or while employees to whom literature is being distributed, or whose membership is being solicited, are on Company time. Company time is that time which the employee is scheduled to be on duty and for which the employee is being paid, excluding rest periods, lunch periods, and time before and after the employee's working day.

Solicitation by employees is permitted on Company property so long as the employees, both those soliciting and those being solicited, are on their own time and the solicitation is conducted in a quiet and orderly manner and does not interfere with the operation of the Company's business. Meetings or speeches are not to be permitted; solicitation which results in disturbing or interfering with the work or function of any of the employees or department is forbidden; solicitation which is detrimental to maintaining the premises in a clean and attractive condition is forbidden.

Solicitation by non-employees of the Company is prohibited at all times in the store and store operated buildings.

It is a violation of the Company's No Solicitation rule either to solicit or be solicited in a manner prohibited by this rule.

Solicitations for charity drives and fund raising campaigns are to follow the guidelines for solicitation as outlined above. The Company generally supports one all-out community charity drive. Prior approval is required for any additional charity drive held on Company property. There are times when expressions of friendship or goodwill for co-workers are permissible, but in order to protect employees from too frequent collections for such purposes written permission for such solicitation must be obtained from the store manager or personnel manager.

Any violations of the Company No Solicitation rule should be reported at once to your immediate supervisor or a store staff member.

Office-Supreme Court, U.S.
FILED
APR 8 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1304

In the Supreme Court of the United States

OCTOBER TERM, 1982

MONTGOMERY WARD & CO., INCORPORATED,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether, in the circumstances of this case, the Board properly found that petitioner violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1), by maintaining and enforcing a rule that prohibits solicitation of off-duty employees by nonemployee union organizers in the public cafeteria of petitioner's retail department store.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 692 F.2d 1115. The decision and order of the National Labor Relations Board (Pet. App. 27a-35a) are reported at 256 N.L.R.B. 800.

JURISDICTION

The judgment of the court of appeals (Pet. App. 25a-26a) was entered on November 10, 1982. The

petition for a writ of certiorari was filed on February 4, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner operates a two-level retail department store in an enclosed shopping mall in Lombard, Illinois. The Buffeteria, a cafeteria-style restaurant, is located on the second floor of the store. The Buffeteria is open to the public, including petitioner's employees, who account for 10 to 20% of the restaurant's business. Customers may enter the Buffeteria from the shopping mall or from the parking lot but not from the retail store. Tables in the Buffeteria ordinarily are separated by three to three-and-a-half foot aisles. (Pet. App. 41a-43a.) Petitioner maintains a credit center on the store's lower level (*id.* at 43a). The credit center employees have a half-hour unpaid lunch period beginning at either noon or 12:30 p.m. (*id.* at 52a).

In early November 1977, following an inquiry by a credit center employee, the respondent union ("the Union") began organizing efforts among credit center employees. By letter dated November 22, the Union informed the credit center manager that it was conducting an organizing campaign (Pet. App. 44a). In response to requests by credit center employees to meet during lunch, Union organizers Regina Polk and John Garcia arranged to meet three employees during the employees' lunch break at noon on December 2 in the Buffeteria. The organizers also arranged to meet several other credit center employees that day at 12:30 p.m. in the Buffeteria (*id.* at 45a).

On the morning of December 2, organizers Polk and Garcia stood on the sidewalk outside the store and distributed union literature. Credit group personnel manager Reed Harvey saw the organizers

distributing literature and also heard "through the grapevine" that they were coming to the Buffeteria during lunch that day. Sometime that morning, Harvey and credit center manager Douglas Ruhl arranged to have lunch together in the Buffeteria (Pet. App. 45a).

At about noon, organizers Polk and Garcia arrived at the Buffeteria, which was half full. Upon entering, the organizers saw the three employees they were to meet seated at a cluster of tables eating their lunches. The closest Buffeteria patrons were seated about 15 feet away from the three employees. The employees motioned to Polk and Garcia, who then sat down with the employees. The employees informed the organizers that two members of management were in the Buffeteria and pointed out managers Harvey and Ruhl who were waiting in the cafeteria line. While the employees and organizers were talking, Harvey and Ruhl approached the group and asked to speak to the person in charge. Organizer Polk said she would talk to Harvey and Ruhl away from the employees. (Pet. App. 45a-46a.)

Harvey, Ruhl, and the two organizers left the Buffeteria and went into an aisle of the retail store. Harvey informed the organizers that they were violating petitioner's policy by coming to the Buffeteria to solicit employees.[1] He also told them that they

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[1] Petitioner's rule concerning solicitation on its premises provided in pertinent part (Pet. App. 59a):

> DISTRIBUTION OF LITERATURE AND SOLICITATION ON COMPANY TIME FOR NON-COMPANY ACTIVITIES
>
> * * * * *
>
> Solicitation by non-employees of the Company is prohibited at all times in the store and store operated buildings.

were trespassing and that they were not permitted to talk to employees or distribute literature in the Buffeteria. Harvey asked the organizers to leave and warned them that he would call the police if they did not go. Polk responded that she would not leave because the Buffeteria was public, that she was a member of the public, and that the employees with whom they were meeting were on their own time and had a right to engage in union activity. Harvey again threatened to call the police if the organizers did not leave and indicated that he was following the orders of petitioner's head of labor relations. (Pet. App. 46a-47a.)

At this point, the four returned to the Buffeteria. Harvey telephoned the police, and Polk and Garcia returned to the table where they had been sitting. In response to the employees' qustions about their conversation with Harvey and Ruhl, Polk said that the organizers were going to have problems meeting with the employees in the cafeteria, that they would have to make other arrangements, and that she would talk to the employees about it later. Polk asked the employees to tell the others with whom the organizers were to meet at 12:30 p.m. that a meeting was not a good idea and that management had told the organizers to leave and was going to call the police. Polk and Garcia then went through the cafeteria line and purchased food. (Pet. App. 47a-48a.)

As soon as Polk and Garcia returned to their table and began to eat, two police officers arrived at the Buffeteria. After talking for about ten minutes, Harvey, Ruhl and the police officers came over to the

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It is a violation of the Company's No Solicitation rule either to solicit or be solicited in a manner prohibited by this rule.

organizers' table and sat down.[2] Harvey told the organizers that they could finish their lunches, but that, if they stayed longer, he would have a complaint issued against them and have them removed. Harvey warned the organizers that he and Ruhl would sit in the Buffeteria to make sure the organizers did not talk to employees. One of the policemen stated that if petitioner swore out a complaint against the organizers, the police would have to arrest them for trespassing. The police asked the organizers for their names, addresses, and identification and then left the Buffeteria. When the organizers finished eating, Harvey, Ruhl, and a plainclothes security officer escorted them out of the building. (Pet. App. 48a-49a.) The Union subsequently filed an unfair labor practice charge with the Board.

2. The Board, adopting the findings of the Administrative Law Judge, concluded that petitioner violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by maintaining and enforcing a rule against solicitation of off-duty employees by non-employee union organizers in its public cafeteria with the purpose of discriminating against union solicita-

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[2] By this time, the three employees had finished their lunch and had left the Buffeteria. On the way back to their work areas, the three employees saw the employees the union organizers were to meet at 12:30 p.m. and told them that police officers and members of management were in the Buffeteria and that the employees should not sit with the union organizers. When these employees arrived in the Buffeteria, ey saw managers Harvey and Ruhl talking with the police officers and the union organizers sitting by themselves at a table. Polk motioned two or three of the employees away, and the employees sat at a table about eight feet from the organizers. (Pet. App. 48a.)

tion (Pet. App. 27a-28a, 65a, 68a).[3] The ALJ found that Manager Harvey testified that he approached the table at which the union organizers were seated because he "assumed they were there for union solicitation," but that he had never approached any other group in the Buffeteria in a similar attempt to enforce the no-solicitation rule. Harvey also testified that he was unsure whether he would prohibit solicitation in the Buffeteria on behalf of the Girl Scouts or the American Bar Association. (*Id.* at 62a-63a.) The ALJ found that petitioner had previously tolerated non-union solicitation in violation of the rule; that, although the rule was ostensibly in effect on December 2, 1977, it was not posted until several days after the incident in the Buffeteria; and that, although the rule barred only solicitation in the store and petitioner's other buildings, it had been invoked against the union organizers when they distributed union literature on a private sidewalk outside the store area (*id.* at 60a, 63a-64a).

The Board also concluded that petitioner's enforcement of its rule to bar union solicitation of off-duty employees by nonemployees in the Buffeteria violated Section 8(a)(1) of the Act, even apart from discriminatory application (Pet. App. 28a). The Board relied (*id.* at 29a) on its decision in *Marshall Field & Co.*, 98 N.L.R.B. 88, modified on other grounds and enforced, 200 F.2d 375 (7th Cir. 1952), in which it rejected the employer's contention that it could law-

[3] The ALJ also found that petitioner violated Section 8(a)(1) of the Act by engaging in surveillance of union activities and by threatening union organizers with arrest (Pet. App. 68a). The Board and the court of appeals upheld these findings (*id.* at 23a-24a, 32a-33a), and the petition does not raise any question as to them.

fully prohibit solicitation in its public restaurants on the ground that such activity would disrupt its business. In *Marshall Field* the Board explained (98 N.L.R.B. at 94) that the circumstances existing in the public restaurants, as opposed to other parts of the store, made remote the possibility of substantial interference with the employer's business by solicitation of off-duty employees.

The Board rejected petitioner's contention that under *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956), petitioner could exclude union organizers from the public restaurant unless the organizers could demonstrate that they lacked alternative means for communicating with employees. The Board stated that "the *Babcock & Wilcox* rationale typically controls in situations where union organizers use 'private' property to which the public is not invited in a manner inconsistent with the property's intended purpose, rather than use of a public restaurant for personal discussion while dining" (Pet. App. 32a; footnote omitted).

3. The court of appeals upheld the Board's decision and enforced its order (Pet. App. 1a-24a). The court concluded (*id.* at 11a) that substantial evidence supported the Board's finding that petitioner discriminatorily enforced its no-solicitation rule in a manner that coerced, restrained and interfered with the exercise of protected employee rights. The court also concluded that the record contained substantial evidence to support the Board's finding that, even apart from its discriminatory application, petitioner's no-solicitation rule was overly broad, since the employee and employer interests involved required "an accommodation which would allow solicitation by nonemployees in the Buffeteria when such organiza-

tional activity was carried on in a nondisruptive fashion consistent with the normal use of the restaurant" (*id.* at 18a).

The court rejected both the Board's contention that *Babcock & Wilcox* does not apply in cases in which the employer's premises are open to the public and petitioner's argument that the Board may not balance employer and employee interests unless there is a preliminary finding of inaccessibility to the union (Pet. App. 17a). The court cited this Court's conclusion in *Hudgens* v. *NLRB*, 424 U.S. 507, 522 (1976), that "the accommodation of § 7 rights and property rights was the core of *Babcock & Wilcox* * * * and that the proper accommodation of the two rights depended in each instance upon the context and the organizational activity involved" (Pet. App. 17a). The court of appeals found that the Board had considered the various interests involved here and had made a reasonable accommodation of those interests. In support of its conclusion that there was substantial evidence to support the Board's findings, the court cited both the obstacles to union access to employees and the minimal intrusion on petitioner's property interests in the circumstances of this case (*id.* at 18a-20a).

ARGUMENT

The court below correctly applied established legal principles to the facts of this case. Its decision does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review by this Court is not warranted.

1. Petitioner does not contest the Board's finding, upheld by the court of appeals (Pet. App. 11a-14a), that it discriminatorily enforced its no-solicitation

rule to bar access to its public cafeteria by nonemployee union organizers.[4] Under the decisions of this Court, it is well settled that an employer violates Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by maintaining or enforcing an otherwise valid no-solicitation rule in a discriminatory manner. See *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956). See also *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 803 n.10 (1945). Accordingly, even if petitioner's no-solicitation rule could lawfully be applied in a nondiscriminatory manner to bar union solicitation by nonemployees in its cafeteria, petitioner's discriminatory enforcement of that rule nevertheless violated the Act.

2. Petitioner contends that the Board and the court of appeals erred in going on to hold that, even apart from its discriminatory application, petitioner's rule barring solicitation of off-duty employees by nonemployee union organizers in its public cafeteria violated Section 8(a)(1). Petitioner contends (Pet. 8-10) that, under *NLRB* v. *Babcock & Wilcox Co.*, *supra*, there must be a preliminary determination that nonemployee organizers cannot obtain access to employees in other ways before the organizers will be accorded access to the employer's property. That contention is based on an unduly narrow reading of *Babcock & Wilcox*.

In *Babcock & Wilcox* the issue was whether an employer could prevent nonemployee union representatives from engaging in organizational solicitation in the parking lot of the employer's industrial plant. This Court held that the employer could lawfully prohibit such activity, because, in the circum-

[4] There is ample evidentiary support for this finding. See pages 5-6, *supra*.

stances of that case, there were reasonable alternative means by which the union could communicate with employees.[5] The Court pointed out (351 U.S. at 112) that accommodation between organization rights and property rights should be reached "with as little destruction of one as is consistent with the maintenance of the other." Subsequently, in *Hudgens* v. *NLRB*, 424 U.S. 507, 522 (1976), a case involving employee picketing in support of a lawful strike in a shopping mall, the Court emphasized that the "*Babcock & Wilcox* opinion established [that] the basic objective under the Act [is] accommodation of § 7 rights and private property rights" and that the "locus of that accommodation * * * may fall at differing points along the spectrum depending on the nature and strength of the respective § 7 rights and private property rights asserted in any given context." [6]

Here the Board followed the mandate of *Babcock & Wilcox* and *Hudgens* by weighing and accommodating the interests of the employer and the employees. Accordingly, the only issue is whether the Board rea-

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[5] In *Babcock & Wilcox*, the factory was located one mile from a town of 21,000 people, where 40% of the 500 employees lived. The rest of the employees lived within a 30-mile radius. 351 U.S. at 106. In upholding the employer's right to exclude the nonemployee union organizers, this Court stressed that "[t]he plants are close to small well-settled communities where a large percentage of the employees live." *Id.* at 113.

[6] In *Hudgens* the Court remanded so that the Board could decide whether the employees' picketing was protected under the Act, directing the Board to consider a number of factors "which may or may not be relevant in striking the proper balance." 424 U.S. at 521-523. On remand, the Board concluded that the employer's property interest in excluding employee pickets should yield to the employees' Section 7 rights. *Scott Hudgens*, 230 N.L.R.B. 414 (1977).

sonably balanced the interests involved in concluding that, in the circumstances of this case, petitioner may not prohibit solicitation of off-duty employees by non-employee union organizers in the public restaurant of its retail store. There is rational support for the balance struck by the Board in this case, and the court below properly declined to upset it.[7]

Petitioner's contention that in the case of non-employee union organizers the existence of alternative means of access is dispositive, regardless of any other factors affecting the "nature and strength" of the rights and interests involved, is inconsistent with the flexible principles applied by this Court. Moreover, it conflicts with this Court's admonition that "mechanical answers" should be avoided in seeking a "solution of this non-mechanical, complex problem" of accommodating employee rights and employer property interests. *NLRB* v. *United Steelworkers*,

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[7] The court below noted that the employees' interest was substantial because there were major obstacles to union access to employees (Pet. App. 18a-19a). The setting of the shopping mall made it difficult for union organizers to follow employees to their homes; employees were unlikely to patronize other restaurants because of distance and the shortness of the lunch break; and the union organizers were unable to obtain a list of employees or to identify their cars in the parking lot. On the other hand, the employer's property interest was "minimally implicated" (*id.* at 19a-20a). The activities of the union organizers were not inconsistent with the normal use of the Buffeteria; the organizers were not distinguishable from other members of the general public, and their conduct was consistent with that of the other patrons; their conversation was inaudible to other patrons, and they did not distribute union literature or converse with patrons other than the employees they had arranged to meet; and the Buffeteria was only half full at the time the union organizers were there, so that they did not occupy tables that could have been used by other customers.

357 U.S. 357, 364 (1958). Instead, the approach taken by the court below, under which alternative access is merely one factor "in evaluating the strength of the competing interests at stake in a specific situation" (Pet. App. 19a n.11), is consistent with the teachings of this Court.[8]

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[8] Petitioner's reliance (Pet. 9-10) on *Central Hardware Co.* v. *NLRB*, 407 U.S. 539 (1972), for the proposition that a finding with respect to alternative means of access is a prerequisite to balancing of employer and employee interests is misplaced. In *Central Hardware*, the Court directed the court of appeals to apply the principles of *Babcock & Wilcox* in determining whether the union's organizational solicitation by nonemployees in the employer's parking lots was protected under the National Labor Relations Act. 407 U.S. at 548. Although the Court noted that the employer contested the Board's finding that there were no alternative reasonable means of union communication with employees (*id.* at 547-548), it did not indicate that that finding was dispositive. Moreover, *Central Hardware* antedated *Hudgens*, in which the Court clarified the *Babcock & Wilcox* principles.

Nor is petitioner aided by its reliance (Pet. 10-11) on *Sears Roebuck & Co.* v. *San Diego Council of Carpenters*, 436 U.S. 180 (1978). The focus in *Sears* was on activity that normally would constitute trespass and on "area standards" picketing, rather than organizational solicitation. The Court stated in *Sears* that the general rule is that the employer may bar nonemployee union organizers from trespassing on its property (436 U.S. at 205), although it indicated that the rule would not always apply. That statement was made in the context of an employer's attempt to obtain a state court injunction against alleged trespass in the form of "area standards" picketing on its private walkways and parking lots. The Court held that the state court suit was not preempted by the Act in the circumstances of that case because there was "serious question" whether "picketing to enforce area standards is entitled to the same deference in the *Babcock* accommodation analysis as organizational solicitation" (436 U.S. at 206 & n.42), and because the union had failed to invoke the jurisdiction of the Board (*id.* at 202, 207).

Petitioner further errs in contending (Pet. 11-12) that the consideration by the court below of the fact that the Buffeteria was open to the public and that the union organizers were using it in a manner consistent with its purpose constitutes a "reversion" to *Amalgamated Food Employees Union* v. *Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968). The Court in *Hudgens* v. *NLRB*, *supra*, overruled the constitutional rationale of *Logan Valley* and made it clear that the mere fact that a shopping center is open to the public is not sufficient to make it a governmental entity for First Amendment purposes. However, the Court did not pass on the entirely different question whether public use could be taken into account in striking the balance between Section 7 rights and property rights for purposes of the National Labor Relations Act. Indeed, the Court in *Hudgens* implicitly approved consideration of the fact that the shopping center in that case was open to the public, stating (424 U.S. at 522; emphasis added) that the locus of accommodation of conflicting interests would depend in part "on the *nature and strength* of the * * * private property rights asserted in any given context."[9]

Unlike *Sears*, the present case involves organizational solicitation. Moreover, as the court below pointed out, "[t]he organizers presumably would be invitees rather than trespassers to the extent that they merely entered the Buffeteria to have lunch with acquaintances" (Pet. App. 19a). Unlike in *Sears*, the organizers were using the employer's premises "in a manner consistent with their normal business use" (Pet. App. 20a n.12). Thus, the justification for finding that the activity here was protected by Section 7 of the Act is far stronger than it was in *Sears*.

[9] Petitioner's final contention (Pet. 13-14) that the court below improperly considered the issue of alternative access because the Board had not first considered it does not afford a basis for review by this Court. The factors the court iden-

Thus, it is clear that nothing in *Hudgens* bars the Board from considering the public nature of the Buffeteria and the manner of its use as one factor in reaching an accommodation of employee and employer interests here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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National Labor Relations Board

APRIL 1983

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tified as creating "obstacles" to the union organizers' access to credit center employees (see Pet. App. 19a) are factors the Board in prior cases had found to justify entry by nonemployee union organizers upon the employer's premises. See *Hutzler Brothers Co.*, 241 N.L.R.B. 914 (1979), enforcement denied, 630 F.2d 1012 (4th Cir. 1980); *Scholle Chemical Corp.*, 192 N.L.R.B. 724 (1971), enforced, 82 L.R.R.M. 2410 (7th Cir. 1972).

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No. 82-1304

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MONTGOMERY WARD & CO., INCORPORATED,
an Illinois Corporation,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, AND WAREHOUSE, MAIL ORDER, OFFICE, TECHNICAL AND PROFESSIONAL EMPLOYEES LOCAL 743, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT UNION'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether substantial evidence on the record exists for the enforcement of the order of the National Labor Relations Board to wit:

A. Whether substantial evidence on the record exists for the Board's finding that the Employer's no-solicitation rule was discriminatorily applied against Union solicitation.

B. Whether substantial evidence on the record exists for the Board's finding that application of the Employer's no-solicitation rule by threats of police action and surveillance against two Union organizers and employees who were quietly sitting at a table in a half-empty public cafeteria violated Section 8(a)(1) of the National Labor Relations Act as amended.

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OPINIONS BELOW

The unanimous decision of the Court of Appeals appears at pages 1a-24a of the Appendix and is reported officially at 692 F. 2d 1115 (1982). The Decision and Order of the National Labor Relations Board (herein the Board) appears at pages 27a-35a of the Appendix and the Decision of Administrative Law Judge Sherman appears at pages 38a-71a.

STATEMENT OF THE CASE

A. Proceedings Below

The Union adopts the statement of the proceedings below contained in the Petition at pages 3-4.

B. Statement of Facts

Among the facts upon which the Court of Appeals relied in making its decision were the following:

> The Buffeteria where the organizers and employees planned to meet is a cafeteria-style restaurant, operated by Montgomery Ward [Ward's] as part of a separate food service department.
>
> * * *
>
> Union organizers Polk and Garcia entered the Buffeteria at noon on December 2, and, upon seeing that the credit center employees they planned to meet were already seated at tables eating their lunches, went directly to a table adjacent to the employees. The Buffeteria was about half full at this time, and the patrons nearest the organizer-employee group were seated about fifteen feet away. The organizers chatted briefly with the employees and, upon request by an employee, distributed union authorization cards. [Managers] Harvey and Ruhl, who had been standing in the self-service line, observed Polk and Garcia enter

the Buffeteria and sit down with the credit center employees. Harvey and Ruhl immediately approached the organizer-employee group and asked to speak to the organizers.

Harvey, Ruhl and the union organizers then left that Buffeteria and went into an aisle in the store area (but still within sight of the credit center employees who remained seated at their table). After exchanging introductions, Harvey told the organizers that they were trespassing on Montgomery Ward property and violating company policy by soliciting employees; Harvey told the organizers that if they did not leave, he would ask the police to remove them. Polk and Garcia stated that they would not leave because they thought Harvey's request violated the employees' rights, and they returned to the table where they had been sitting. After discussing the incident with the organizers, the employees left; and Polk and Garcia purchased some food at the self-service counter and returned to the table they had occupied before. In the meantime, Harvey called the police.

After two uniformed police officers arrived, Harvey and Ruhl, accompanied by the police officers, sat down at the union organizers' table. Harvey told the organizers that they could finish eating their lunches but, if they spoke to any employees or refused to leave after eating, he would sign a complaint against them and have them removed. The policemen took the organizers' names and addresses, and then left; Harvey and Ruhl remained seated at a table next to the organizers, watching them finish their lunches. About ten minutes later, the organizers left the Buffeteria, accompanied by Harvey, Ruhl and a plainclothes security guard. The Union filed this unfair labor practices charge five days later on December 7, 1977.

The Union's efforts at contacting the employees after the Buffeteria incident were not very successful. When the organizers distributed union literature on the sidewalks next to the store,

Montgomery Ward called the police to remove them on at least two occasions. The Union was also unsuccessful in gathering information about the credit center workforce. Employees sympathetic to the Union were unable to secure a complete list of credit center employees. Further, the Union was unable accurately to identify (by license number) cars belonging to credit center employees after Montgomery Ward told the credit center employees to park in a new area where their cars were interspersed with automobiles belonging to other employees and customers. (App. 3a-6a, footnotes omitted.)

REASONS FOR DENYING THE WRIT

1. The Court of Appeals Found An Alternate Ground For Granting Substantially The Same Relief Which Is Not Contested Here.

The essence of the Board's Order which the Court of Appeals enforced is that Ward's must not enforce its no-solicitation rule against Union organizers and employees in the Buffeteria when the organizers and employees are comporting themselves in a manner consistent with the purpose of the Buffeteria. (App. 33a) Two grounds exist for enforcement: First, substantial evidence supports the finding by the Board that Ward's discriminatorily enforced its no-solicitation rule against Union solicitation only and, second, the enforcement of the rule under the particular circumstances of this case violates employees' protected rights to be solicited and otherwise to receive information about a Union. Either of these grounds supports the Order. The Order would have to be modified only slightly if the second ground is not supported.

The Petitioner does not assign as error the first ground for enforcing the Board's Order. Accordingly, it will be presumed that the no-solicitation rule was discriminatorily enforced against Union solicitations only. *Prudence Co.* v. *Fidelity and Deposit Co.*, 297 U.S. 198, 56 S. Ct. 387, 80 L. Ed. 581 (1936).

Thus, since one of the grounds for enforcing the Board's Order is not even contested here, there is no substantial question warranting granting of the writ.

2. The Petition Misstates The Court Of Appeals Decision And Its Rationale.

The Petition incorrectly states that the Court's second reason for enforcing the Board's Order rested on the discredited proposition that "private property open to the public acquires a public characteristic." (Petition 11) The Court of Appeals decision reveals, on the contrary, that the Court specifically rejected such a rationale: "We must, therefore, reject . . . the Board's contention that *Babcock & Wilcox* does not apply where access to the employer's premises is open to the public . . ." (App. 17a). Rather, the Court of Appeals held that the conditions under which the property may be open to the public is one circumstance which is significant to the balance between property rights and organizational interests which the Board struck. (Ibid.)

Moreover, the Court of Appeals did not, as the Petition claims, (page 11) rely on *Amalgamated Food Employees' Union v. Logan Valley Plaza*, 391 U.S. 308, 88 S. Ct. 1601, 20 L Ed. 2d 603 (1968). *Logan Valley* was a First Amendment case. The Court of Appeals was careful to state:

> "It is important to remember that the standard ultimately being applied is that of the National Labor Relations Act, which Babcock & Wilcox articulates but cannot easily and precisely define for all places and all times." (Ibid.)

In short, the Court of Appeals was careful to apply principles under the National Labor Relations Act, forgetting First Amendment principles which were not raised. This distinguishes this case from *Central Hardware Co.*, v. *NLRB*, 407 U.S. 539, 33 L. Ed. 2d 122, 92 S. Ct. 2238 (1972) where the error assigned was the application of First Amendment principles to NLRA cases. (Id. at 545)

The Petition also misrepresents that:

> "The Seventh Circuit's position [is] that Babcock & Wilcox is limited to its facts...." (p. 10)

Rather, the Court of Appeals held that *its own* decision was limited to its facts in keeping with this Court's teaching in *Babcock & Wilcox*. The Court of Appeals carefully concluded that there was substantial evidence to support the Board's finding:

> "Under the circumstances of this case...." (App. 15a)

> "Although a ban on solicitation in restaurants may amount to an appropriate assertion of property or management rights in restaurants where customer convenience may be compromised if disruptive Union solicitation is allowed, the facts in the case before us do not justify such a ban." (App. 23a)

Rather than limiting Babcock & Wilcox to its facts, the Court of Appeals properly applied the "accommodation" principle enunciated by this Court in *Babcock & Wilcox*, *Central Hardware*, *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 57 L. Ed. 2d 370, 98 S. Ct. 2463 (1978) and *Hudgens* v. *NLRB*, 424 U.S. 507, 47 L. Ed. 2d 196, 96 S. Ct. 1029 (1976), to wit, that property and management interests must be carefully balanced on the facts of each case against employee organizational interests.

Nor did the Court of Appeals, in striking the balance mandated by this Court, ignore the fact that the persons against whom the rule was initially enforced were non-employees, whose rights are different from those of employees. Neither, however, did the Court of Appeals ignore the fact that employees themselves were desirous of receiving the solicitation and were participants in the solicitation forbidden by Ward's. (App. 7a)

Finally, the Petition misrepresents that the Court of Appeals engaged in prohibited fact finding (Petition 13-14). The Court of Appeals did not find that the outside Union organizers had no

other reasonable means of access to the employees other than the use of the cafeteria within the meaning of *Babcock & Wilcox*. Rather, in balancing the respective interests, the Court of Appeals considered the difficulty that the outside organizers had in obtaining access to the employees in this location. (App. 18a-19a) The Court of Appeals did not find that the employees were inaccessible; the Court of Appeals rather took facts found by the Board and applied them to its balancing test.

The substantial misrepresentations of the Court of Appeals decision by the Petitioner is yet another ground for denial of the writ.

3. No Substantial Federal Question Warranting Granting Of A Writ Is Presented In This Case.

It has already been established that the Court of Appeals specifically limited its enforcement of the Board's Order to those facts presented in this case. Those facts included the difficulty of Union access through alternate channels, the characteristic use to which Ward's dedicated the Buffeteria property, the condition of the Buffeteria at the time that the solicitation was made, the manner in which that solicitation was made, the number of persons involved, that the employees were on their lunch break and had, in fact, purchased food to be consumed in the Buffeteria, and all of the other facts found by the Board and its Administrative Law Judge.

The Court was very careful to avoid the enunciation of wide-reaching principles which would mandate such orders in other fact situations. The Court of Appeals was very careful to weigh and consider the particular facts in this case, the property and management interests asserted by Ward's and the legitimate management and property interests that Ward's had in the use of the Buffeteria. It was only after concluding that Ward's in this case had no legitimate managements interests which conflicted

with the manner and usage of the Buffeteria by the Union organizers and the solicited employees that the Court of Appeals held for the Board on the second ground.

These precise facts are unlikely to recur in other cases. Thus, granting the writ here would be to grant the writ to decide questions which are of interest only to the litigating parties and not to the general development of the law.

4. The Court Of Appeals Correctly Decided The Issue Under The Law Of This Court.

The fundamental principle applied by the Court of Appeals is a balancing of organizational interest protected by the National Labor Relations Act against management and property interests protected by the Constitution of the United States. Only if such a balancing test is rejected was the decision of the Court of Appeals erroneous on the second ground.

All of the decisions cited by the Court of Appeals lead to the inescapable conclusion that it is the teaching of this Court that those interests considered by the Court of Appeals must be weighed, evaluated and balanced, as the Court of Appeals properly did.

The thrust of this Court's decisions in *Babcock & Wilcox*, *Beth Israel*, *Hudgens* and *Central Hardware* is that property rights and organizational rights must be accommodated "with as little destruction of one as is consistent with the maintenance of the other." (351 U.S. at 112). This is the "guiding principle" of the *Babcock & Wilcox* decision. (407 U.S. at 539; 424 U.S. at 522) The reason for refusing to enforce the Board's order in *Babcock & Wilcox* was that the Board had wrongly applied the standard for employee solicitation to non-employees without considering the different interests raised.

Sears, Roebuck & Co. v. *San Diego County Council of Carpenters*, 436 U.S. 180, 56 L. Ed. 2d 209, 98 S. Ct. 1745 (1978) and *Central Hardware* do not support the Petition.

Central Hardware simply stands for the proposition that NLRA interests, not constitutional right standards, should apply in solicitation cases on employer property. The Court of Appeals in this case properly rejected constitutional standards and used the NLRA balancing test for which *Central Hardware* stands.

Sears Roebuck is similarly inapplicable because it was a preemption case in which the picketing, not solicitation, was a clear trespass as opposed to this case where, as the Court of Appeals properly found, the Union organizers were, at least at first, business invitees. Moreover, the language quoted from the *Sears* opinion is not its holding but only illustrative of the principle that the state court injunction had little probable effect upon legitimate interests protected by the National Labor Relations Act.

Since the Court of Appeals properly adopted this Court's balancing test, the writ should be denied.

CONCLUSION

Wherefore, for the reasons herein stated, as well as any additional reasons to be presented by the Solicitor General, the Union Respondent submits that the Petition should be denied.

Respectfully submitted,

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the Buffeteria and sit down with the credit center employees. Harvey and Ruhl immediately approached the organizer-employee group and asked to speak to the organizers.

Harvey, Ruhl and the union organizers then left that Buffeteria and went into an aisle in the store area (but still within sight of the credit center employees who remained seated at their table). After exchanging introductions, Harvey told the organizers that they were trespassing on Montgomery Ward property and violating company policy by soliciting employees; Harvey told the organizers that if they did not leave, he would ask the police to remove them. Polk and Garcia stated that they would not leave because they thought Harvey's request violated the employees' rights, and they returned to the table where they had been sitting. After discussing the incident with the organizers, the employees left; and Polk and Garcia purchased some food at the self-service counter and returned to the table they had occupied before. In the meantime, Harvey called the police.

After two uniformed police officers arrived, Harvey and Ruhl, accompanied by the police officers, sat down at the union organizers' table. Harvey told the organizers that they could finish eating their lunches but, if they spoke to any employees or refused to leave after eating, he would sign a complaint against them and have them removed. The policemen took the organizers' names and addresses, and then left; Harvey and Ruhl remained seated at a table next to the organizers, watching them finish their lunches. About ten minutes later, the organizers left the Buffeteria, accompanied by Harvey, Ruhl and a plainclothes security guard. The Union filed this unfair labor practices charge five days later on December 7, 1977.

The Union's efforts at contacting the employees after the Buffeteria incident were not very successful. When the organizers distributed union literature on the sidewalks next to the store,

Montgomery Ward called the police to remove them on at least two occasions. The Union was also unsuccessful in gathering information about the credit center workforce. Employees sympathetic to the Union were unable to secure a complete list of credit center employees. Further, the Union was unable accurately to identify (by license number) cars belonging to credit center employees after Montgomery Ward told the credit center employees to park in a new area where their cars were interspersed with automobiles belonging to other employees and customers. (App. 3a-6a, footnotes omitted.)

REASONS FOR DENYING THE WRIT

1. The Court of Appeals Found An Alternate Ground For Granting Substantially The Same Relief Which Is Not Contested Here.

The essence of the Board's Order which the Court of Appeals enforced is that Ward's must not enforce its no-solicitation rule against Union organizers and employees in the Buffeteria when the organizers and employees are comporting themselves in a manner consistent with the purpose of the Buffeteria. (App. 33a) Two grounds exist for enforcement: First, substantial evidence supports the finding by the Board that Ward's discriminatorily enforced its no-solicitation rule against Union solicitation only and, second, the enforcement of the rule under the particular circumstances of this case violates employees' protected rights to be solicited and otherwise to receive information about a Union. Either of these grounds supports the Order. The Order would have to be modified only slightly if the second ground is not supported.

The Petitioner does not assign as error the first ground for enforcing the Board's Order. Accordingly, it will be presumed that the no-solicitation rule was discriminatorily enforced against Union solicitations only. *Prudence Co.* v. *Fidelity and Deposit Co.*, 297 U.S. 198, 56 S. Ct. 387, 80 L. Ed. 581 (1936).

Thus, since one of the grounds for enforcing the Board's Order is not even contested here, there is no substantial question warranting granting of the writ.

2. The Petition Misstates The Court Of Appeals Decision And Its Rationale.

The Petition incorrectly states that the Court's second reason for enforcing the Board's Order rested on the discredited proposition that "private property open to the public acquires a public characteristic." (Petition 11) The Court of Appeals decision reveals, on the contrary, that the Court specifically rejected such a rationale: "We must, therefore, reject . . . the Board's contention that *Babcock & Wilcox* does not apply where access to the employer's premises is open to the public . . ." (App. 17a). Rather, the Court of Appeals held that the conditions under which the property may be open to the public is one circumstance which is significant to the balance between property rights and organizational interests which the Board struck. (Ibid.)

Moreover, the Court of Appeals did not, as the Petition claims, (page 11) rely on *Amalgamated Food Employees' Union v. Logan Valley Plaza*, 391 U.S. 308, 88 S. Ct. 1601, 20 L Ed. 2d 603 (1968). *Logan Valley* was a First Amendment case. The Court of Appeals was careful to state:

> "It is important to remember that the standard ultimately being applied is that of the National Labor Relations Act, which Babcock & Wilcox articulates but cannot easily and precisely define for all places and all times." (Ibid.)

In short, the Court of Appeals was careful to apply principles under the National Labor Relations Act, forgetting First Amendment principles which were not raised. This distinguishes this case from *Central Hardware Co.*, v. *NLRB*, 407 U.S. 539, 33 L. Ed. 2d 122, 92 S. Ct. 2238 (1972) where the error assigned was the application of First Amendment principles to NLRA cases. (Id. at 545)

The Petition also misrepresents that:

> "The Seventh Circuit's position [is] that Babcock & Wilcox is limited to its facts...." (p. 10)

Rather, the Court of Appeals held that *its own* decision was limited to its facts in keeping with this Court's teaching in *Babcock & Wilcox*. The Court of Appeals carefully concluded that there was substantial evidence to support the Board's finding:

> "Under the circumstances of this case...." (App. 15a)

> "Although a ban on solicitation in restaurants may amount to an appropriate assertion of property or management rights in restaurants where customer convenience may be compromised if disruptive Union solicitation is allowed, the facts in the case before us do not justify such a ban." (App. 23a)

Rather than limiting Babcock & Wilcox to its facts, the Court of Appeals properly applied the "accommodation" principle enunciated by this Court in *Babcock & Wilcox*, *Central Hardware*, *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 57 L. Ed. 2d 370, 98 S. Ct. 2463 (1978) and *Hudgens* v. *NLRB*, 424 U.S. 507, 47 L. Ed. 2d 196, 96 S. Ct. 1029 (1976), to wit, that property and management interests must be carefully balanced on the facts of each case against employee organizational interests.

Nor did the Court of Appeals, in striking the balance mandated by this Court, ignore the fact that the persons against whom the rule was initially enforced were non-employees, whose rights are different from those of employees. Neither, however, did the Court of Appeals ignore the fact that employees themselves were desirous of receiving the solicitation and were participants in the solicitation forbidden by Ward's. (App. 7a)

Finally, the Petition misrepresents that the Court of Appeals engaged in prohibited fact finding (Petition 13-14). The Court of Appeals did not find that the outside Union organizers had no

other reasonable means of access to the employees other than the use of the cafeteria within the meaning of *Babcock & Wilcox*. Rather, in balancing the respective interests, the Court of Appeals considered the difficulty that the outside organizers had in obtaining access to the employees in this location. (App. 18a-19a) The Court of Appeals did not find that the employees were inaccessible; the Court of Appeals rather took facts found by the Board and applied them to its balancing test.

The substantial misrepresentations of the Court of Appeals decision by the Petitioner is yet another ground for denial of the writ.

3. No Substantial Federal Question Warranting Granting Of A Writ Is Presented In This Case.

It has already been established that the Court of Appeals specifically limited its enforcement of the Board's Order to those facts presented in this case. Those facts included the difficulty of Union access through alternate channels, the characteristic use to which Ward's dedicated the Buffeteria property, the condition of the Buffeteria at the time that the solicitation was made, the manner in which that solicitation was made, the number of persons involved, that the employees were on their lunch break and had, in fact, purchased food to be consumed in the Buffeteria, and all of the other facts found by the Board and its Administrative Law Judge.

The Court was very careful to avoid the enunciation of wide-reaching principles which would mandate such orders in other fact situations. The Court of Appeals was very careful to weigh and consider the particular facts in this case, the property and management interests asserted by Ward's and the legitimate management and property interests that Ward's had in the use of the Buffeteria. It was only after concluding that Ward's in this case had no legitimate managements interests which conflicted

with the manner and usage of the Buffeteria by the Union organizers and the solicited employees that the Court of Appeals held for the Board on the second ground.

These precise facts are unlikely to recur in other cases. Thus, granting the writ here would be to grant the writ to decide questions which are of interest only to the litigating parties and not to the general development of the law.

4. The Court Of Appeals Correctly Decided The Issue Under The Law Of This Court.

The fundamental principle applied by the Court of Appeals is a balancing of organizational interest protected by the National Labor Relations Act against management and property interests protected by the Constitution of the United States. Only if such a balancing test is rejected was the decision of the Court of Appeals erroneous on the second ground.

All of the decisions cited by the Court of Appeals lead to the inescapable conclusion that it is the teaching of this Court that those interests considered by the Court of Appeals must be weighed, evaluated and balanced, as the Court of Appeals properly did.

The thrust of this Court's decisions in *Babcock & Wilcox, Beth Israel, Hudgens* and *Central Hardware* is that property rights and organizational rights must be accommodated "with as little destruction of one as is consistent with the maintenance of the other." (351 U.S. at 112). This is the "guiding principle" of the *Babcock & Wilcox* decision. (407 U.S. at 539; 424 U.S. at 522) The reason for refusing to enforce the Board's order in *Babcock & Wilcox* was that the Board had wrongly applied the standard for employee solicitation to non-employees without considering the different interests raised.

Sears, Roebuck & Co. v. *San Diego County Council of Carpenters*, 436 U.S. 180, 56 L. Ed. 2d 209, 98 S. Ct. 1745 (1978) and *Central Hardware* do not support the Petition.

Central Hardware simply stands for the proposition that NLRA interests, not constitutional right standards, should apply in solicitation cases on employer property. The Court of Appeals in this case properly rejected constitutional standards and used the NLRA balancing test for which *Central Hardware* stands.

Sears Roebuck is similarly inapplicable because it was a preemption case in which the picketing, not solicitation, was a clear trespass as opposed to this case where, as the Court of Appeals properly found, the Union organizers were, at least at first, business invitees. Moreover, the language quoted from the *Sears* opinion is not its holding but only illustrative of the principle that the state court injunction had little probable effect upon legitimate interests protected by the National Labor Relations Act.

Since the Court of Appeals properly adopted this Court's balancing test, the writ should be denied.

CONCLUSION

Wherefore, for the reasons herein stated, as well as any additional reasons to be presented by the Solicitor General, the Union Respondent submits that the Petition should be denied.

Respectfully submitted,

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